Supreme Court, U.S.
FILED

No. 95 1956 JUN 3 1996

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
PETITIONERS

v.

STATE OF SOUTH DAKOTA AND CITY OF OACOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

EDWARD J. SHAWAKER
ANNE S. ALMY
LISA E. JONES
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JOHN D. LESHY
Solicitor
Department of the Interior
Washington, D.C. 20240

10 pp

QUESTION PRESENTED

Whether Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. 465, which authorizes the Secretary of the Interior to acquire interests in real property "for the purpose of providing land for Indians," is an unconstitutional delegation of legislative power.

PARTIES TO THE PROCEEDING

Petitioners are the United States Department of the Interior, Eddie F. Brown, in his official capacity as Assistant Secretary of Indian Affairs, and Jerry Jaeger, in his official capacity as Acting Area Director, Bureau of Indian Affairs. Respondents are the State of South Dakota and the City of Oacoma, South Dakota.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	3
Reasons for granting the petition	15
Conclusion	27
Appendix A	1a
Appendix B	31a
Appendix C	55a
Appendix D	61a
Appendix E	63a
Appendix F	64a

TABLE OF AUTHORITIES

Cases:

American Power & Light Co. v. *SEC*, 329 U.S. 90 (1946)	21, 24
Block v. *North Dakota*, 461 U.S. 273 (1983)	7
Brendale v. *Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989)	17
Chappell v. *United States*, 494 U.S. 1075 (1990)	25
Cherokee Nation v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831)	4
City of Chicago v. *Environmental Defense Fund*, 113 S. Ct. 486 (1992)	25
County of Yakima v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992)	4, 5, 17
Edward J. DeBartolo Corp. v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988)	19
FPC v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944)	20-21
Fisher v. *District Court*, 424 U.S. 382 (1976)	5

Cases—Continued: Page

Florida Dep't of Business Regulation v. *United States Dep't of Interior*, 768 F.2d 1248 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986) 11, 12
Hodel v. *Irving*, 481 U.S. 704 (1987) 4, 8, 21
Iowa Mutual Ins. Co. v. *LaPlante*, 480 U.S. 9 (1987) 5
J.W. Hampton Jr. & Co. v. *United States*, 276 U.S. 394 (1928) 21
Jean v. *Nelson*, 472 U.S. 846 (1985) 18
Lawrence v. *Chater*, 116 S. Ct. 404 (1996) 25
Lichter v. *United States*, 334 U.S. 742 (1948)..... 20
Lower Brule Sioux Tribe v. *South Dakota*, 917 F. Supp. 1434 (D.S.D. 1996) 8
Mescalero Apache Tribe v. *Jones*, 411 U.S. 145 (1973) 5, 17, 21, 22
Mistretta v. *United States*, 488 U.S. 361 (1989)..11, 19, 21
Morton v. *Mancari*, 417 U.S. 535 (1974) 4, 21
NBC v. *United States*, 319 U.S. 190 (1943) 21
New Mexico v. *Mescalero Apache Tribe*, 462 U.S. 324 (1983) 5, 22
Polsky v. *Wetherill*, 403 U.S. 916 (1971) 25
Reed v. *United States*, 114 S. Ct. 1289 (1994)..... 25
Schmidt v. *Espy*, 115 S. Ct. 43 (1994) 25
Skinner v. *Mid-America Pipeline Co.*, 490 U.S. 212 (1989) 19, 20, 24
South Dakota v. *Aberdeen Area Director, Bureau of Indian Affairs*, 22 I.B.I.A. 126 (1992) 9
Touby v. *United States*, 500 U.S. 160 (1991)..... 21, 24
United States v. *Gainey*, 380 U.S. 63 (1965) 17
United States v. *Mottaz*, 476 U.S. 834 (1986) 7
United States v. *Salerno*, 481 U.S. 739 (1987)..... 20
Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) 18, 19
Washington v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) 5
Wells v. *United States*, 114 S. Ct. 1609 (1994)..... 25
White Mountain Apache Tribe v. *Bracker*, 448 U.S. 136 (1980) 22
Yakus v. *United States*, 321 U.S. 414 (1944) 20

Constitution, statutes and regulations: Page

U.S. Const.:
Art. I, § 1 ..... 2, 12
Amend. X 10, 11
Act of Mar. 2, 1889 (Sioux Allotment Act), ch. 405, 25 Stat. 888 8
Administrative Procedure Act, 5 U.S.C. 701 *et seq.*... 3, 6
5 U.S.C. 701(a)(2) 6, 10
5 U.S.C. 702 10
5 U.S.C. 706(2) 7
5 U.S.C. 706(2)(A) 10
American Indian Agricultural Resource Management Act, 25 U.S.C. 3701 *et seq.* 16
Energy Policy Act of 1992, Pub. L. No. 102-486, Tit. XXVI, 106 Stat. 3113 (25 U.S.C. 3501 *et seq.*) 16
Higher Education Tribal Grant Authorization Act, 25 U.S.C. 3301 *et seq.* 16
Indian Education Act of 1988, 25 U.S.C. 2601 *et seq.* 16
Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.* 16
Indian General Allotment Act, ch. 119, 24 Stat. 388 4
Indian Land Consolidation Act, 25 U.S.C. 2201 *et seq.* 16, 23
25 U.S.C. 2202 23
Indian Lands Open Dump Cleanup Act of 1994, 25 U.S.C. 3901 *et seq.* 16
Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 ..... 4, 22
Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq.* 2
§ 1, 25 U.S.C. 461 5
§ 2, 25 U.S.C. 462 5
§ 3, 25 U.S.C. 463 5
§ 4, 25 U.S.C. 464 5
§ 5, 25 U.S.C. 465 .....*passim*

Statutes and regulations—Continued: Page

Indian Reorganization Act Amendments of 1988, Pub. L. No. 100-581, Tit. I, § 101, 102 Stat. 2938.. 23
Indian Reorganization Act Amendments of 1990, Pub. L. No. 101-301, 104 Stat. 206:
§ 3(b), 104 Stat. 207 23
§ 3(c), 104 Stat. 207 23
Indian Reorganization Act Amendments of 1994, Pub. L. No. 103-263, § 5(b), 108 Stat. 709 23
Indian Self-Determination Act, 25 U.S.C. 450f *et seq.* 16
Indian Tribal Justice Act, 25 U.S.C. 3601 *et seq.*..... 16
National Indian Forest Resources Management Act, 25 U.S.C. 3101 *et seq.* 16
Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001 *et seq.* 16
Native American Languages Act, 25 U.S.C. 2901 *et seq.* 16
Quiet Title Act, 28 U.S.C. 2409a 7
28 U.S.C. 2409a(a) 7, 11
Tribally Controlled Schools Act of 1988, 25 U.S.C. 2501 *et seq.* 16
18 U.S.C. 1151 *et seq.* 17
28 U.S.C. 2106 25
25 C.F.R.:
Pt. 2:
Section 2.6(c) 9
Pt. 120a (1981) 6
Pt. 151 ..... 6, 23
Section 151.3 6
Section 151.10 ..... 6, 9
Section 151.11(d) 6
Section 151.12 7
Section 151.12(b) 24, 68a

Miscellaneous:

F. Cohen, *Handbook of Federal Indian Law*:
(1942) 16
(1982) 4

Miscellaneous—Continued: Page

Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 Mich. L. Rev. 955 (1972) 16
78 Cong. Rec. (1934):
p. 11,727 16
p. 11,730 16
p. 11,732 16
47 Fed. Reg. (1982):
p. 13,326 6
p. 13,327 6
60 Fed. Reg. (1995):
p. 32,874 6
p. 32,877 6
61 Fed. Reg. 18,082 (1996) 7
H.R. Rep. No. 1804, 73d Cong., 2d Sess. (1934) 5, 16, 23
Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs, 73d Cong., 2d Sess. (1934) 4
S. Rep. No. 1080, 73d Cong., 2d Sess. (1934) 23

In the Supreme Court of the United States

OCTOBER TERM, 1995

No.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
PETITIONERS

v.

STATE OF SOUTH DAKOTA AND CITY OF OACOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Department of the Interior, *et al.*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-30a) is reported at 69 F.3d 878. The memorandum opinion and judgment of the district court (App., *infra*, 31a-54a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1995. A petition for rehearing was

denied on February 2, 1996. App., *infra*, 63a. On April 23, 1996, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including June 3, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I of the United States Constitution states in pertinent part as follows:

> All legislative Powers herein granted shall be vested in a Congress of the United States.

U.S. Const. Art. I, § 1.

Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq.*, states as follows:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.
>
> The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.
>
> Title to any lands or rights acquired pursuant to [provisions of this Act] shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. 465.

STATEMENT

Respondents State of South Dakota and City of Oacoma sued the United States Department of the Interior under Section 10 of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* They challenged the Department's decision to place 91 acres of land, which the Lower Brule Sioux Tribe had purchased in fee, in trust status pursuant to Section 5 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. 461 *et seq.* See IRA § 5, 25 U.S.C. 465. The United States District Court for the District of South Dakota determined that the APA does not waive the Department's sovereign immunity in the circumstances presented here, and it rejected respondents' contentions that Section 5 is unconstitutional. The court of appeals reversed that decision. Without reaching the statutory issues, the court held that Section 5 of the IRA is an unconstitutional delegation of legislative power.

1. Since the formation of the Union, the United States has recognized Indian Tribes as domestic dependent nations that possess power to govern their

members and their territory. See *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831). Nevertheless, at the close of the nineteenth century, Congress adopted a policy, reflected in the Indian General Allotment Act, ch. 119, 24 Stat. 388 (1887), of dismantling Indian tribal governments, allotting parcels of tribal land to individual members, and conveying "surplus" tribal land to non-Indians. Under that policy, the Indians were expected to become farmers or ranchers and assimilate into the non-Indian culture. See *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 253-254 (1992).

Congress's policy of allotting Indian land "quickly proved disastrous for the Indians." *Hodel* v. *Irving*, 481 U.S. 704, 707 (1987). It ultimately resulted in a large-scale transfer of Indian lands out of Indian ownership, which undermined tribal communities and impoverished the Tribes and their members. See *id.* at 707-708; F. Cohen, *Handbook of Federal Indian Law* 136-138 (1982). As a result of the allotment program, total Indian landholdings diminished from 138 million acres in 1887 to 48 million acres in 1934. See *County of Yakima*, 502 U.S. at 255-256; *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess. 16 (1934) (Memorandum of John Collier, Commissioner of Indian Affairs).

Congress responded to the failure of its allotment policy by enacting the IRA in 1934. See ch. 576, 48 Stat. 984. The IRA's "overriding purpose" was "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974). The Act sought "to rehabilitate the Indian's economic life and to give

him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934)); see also *Iowa Mutual Ins. Co.* v. *LaPlante*, 480 U.S. 9, 14 n.5 (1987); *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983); *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 168 (1980) (Brennan, J., concurring in part and dissenting in part); *id.* at 180 (Rehnquist, J., concurring in part and dissenting in part); *Fisher* v. *District Court*, 424 U.S. 382, 386 (1976).

Congress recognized that Indian Tribes could not maintain their political and economic self-sufficiency unless they were able to retain, protect, and supplement their land base. Accordingly, the IRA expressly discontinued the allotment program (IRA § 1, 25 U.S.C. 461); it extended indefinitely the existing periods of the government's trust with respect to Indian lands (IRA § 2, 25 U.S.C. 462); it authorized the Secretary of the Interior to restore unallotted surplus reservation lands to Indian ownership (IRA § 3, 25 U.S.C. 463); and it limited the sale or transfer of restricted Indian land (IRA § 4, 25 U.S.C. 464). Of particular interest in this case, Section 5 of the IRA authorizes the Secretary to take real property into trust on behalf of Tribes and individual Indians. 25 U.S.C. 465. By authorizing new trust acquisitions, Section 5 allows the Department of the Interior to restore or replace the lands and related economic opportunities that were lost through the allotment process. See *County of Yakima*, 502 U.S. at 255.

In 1980, the Department of the Interior issued detailed regulations governing the Secretary's reso-

lution of tribal requests under Section 5 to place Indian-owned land in trust status. See generally 25 C.F.R. Pt. 151.[1] Those regulations state a general policy regarding trust land acquisitions, 25 C.F.R. 151.3, and they specify particular factors, derived from Congress's statutory purposes and the Secretary's experience in implementing the IRA, that guide the Secretary's review of land acquisition requests, 25 C.F.R. 151.10. Those factors include: (1) the Indians' need for additional land; (2) the purposes for which the land will be used; (3) the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls; and (4) jurisdictional problems and potential conflicts that may arise. 25 C.F.R. 151.10.[2]

The question has arisen from time to time whether the Department of the Interior's land acquisition decisions under Section 5 are subject to judicial review under Section 10 of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* The Department initially took the view that those decisions are unreviewable because they are "committed to agency discretion by law." 5 U.S.C. 701(a)(2). See IRA § 5,

[1] The regulations were originally codified at 25 C.F.R. Part 120a (1981) and were recodified in 1982 at 25 C.F.R. Part 151. See 47 Fed. Reg. 13,326, 13,327 (1982).

[2] In June 1995, the Department of the Interior revised the regulations to identify additional factors bearing on off-reservation acquisitions (25 C.F.R. 151.10), to formalize the Department's practice of notifying affected state and local governments of proposed acquisitions and providing an opportunity for response (25 C.F.R. 151.11(d)), and to provide a consultation process to resolve regulatory disputes between Indian Tribes and States (*ibid.*). See 60 Fed. Reg. 32,874, 32,877 (1995).

25 U.S.C. 465 (authorizing the Secretary, "in his discretion," to acquire land in trust). The Department has since concluded, however, that although Section 5 confers discretion, the exercise of that discretion is not entirely unreviewable. The Department of the Interior has accordingly determined (and the Department of Justice agrees) that a decision to acquire land in trust under Section 5 of the IRA is subject to judicial review under the APA, see 5 U.S.C. 706 (2), taking into account the factors identified in the Secretary's regulations as relevant in making such decisions.

In conjunction with that determination, the Department of the Interior has promulgated a procedural regulation to provide an opportunity for judicial review before the land is actually taken into trust. See Land Acquisitions (Nongaming), 61 Fed. Reg. 18,082 (1996) (to be codified at 25 C.F.R. 151.12), *reprinted at* App., *infra*, 64a-69a. That regulation states that the Secretary must provide public notice of a final decision to acquire land in trust at least thirty days before the formal transfer of title to the United States. *Id.* at 69a. A person who objects to the Secretary's land acquisition decision will then have an opportunity during that period to file a judicial challenge before the formal conveyance of the property to the United States in trust. Once the property is actually conveyed to the United States, however, a suit seeking to disturb title would be barred, because the Quiet Title Act (QTA), 28 U.S.C. 2409a, "does not apply to trust or restricted Indian lands." 28 U.S.C. 2409a(a). See *United States* v. *Mottaz*, 476 U.S. 834 (1986); *Block* v. *North Dakota*, 461 U.S. 273, 284-285 (1983).

2. This case arises out of the Lower Brule Tribe's request that the Department of the Interior place a

parcel of tribal land into trust status pursuant to Section 5 of the IRA. The Lower Brule Tribe occupies a Reservation within central South Dakota. Congress established the original boundaries of the Reservation in 1889 through the Sioux Allotment Act (Act of Mar. 2, 1889, ch. 405, 25 Stat. 888), which divided the Great Sioux Reservation into several smaller reservations, effected the cession of 9 million acres of "surplus" tribal land, and provided for allotment of the remaining land. See *Irving*, 481 U.S. at 706-707. The Lower Brule Reservation originally consisted of 446,500 acres. But as a result of the allotment process and other programs (including federal condemnations for flood control), the Lower Brule Reservation has since been reduced to approximately 235,800 acres. Only 119,900 acres remain in Indian ownership or in federal ownership for Indian use. See *Lower Brule Sioux Tribe* v. *South Dakota*, 917 F. Supp. 1434, 1441 (D.S.D. 1996).[3]

In 1990, the Tribe purchased a 91-acre parcel of land from a private landowner to develop an industrial park. The parcel is located seven miles south of the Lower Brule Sioux Reservation, partially within the City of Oacoma, and near the site of the original Lower Brule Bureau of Indian Affairs (BIA) Agency. After completing the purchase, the Tribe submitted a letter to the Lower Brule BIA Agency requesting that the United States place that parcel in trust. The BIA sent a letter to respondents informing them of the Tribe's request and inviting

[3] Of those 119,900 acres, the federal government holds 76,700 acres in tribal trust. The federal government owns 13,200 acres for Indian use, while 30,000 acres are allotted lands. See 917 F. Supp. at 1441.

comments on the proposal. The State and City objected to the request on a variety of grounds. See App., *infra*, 2a, 32a-34a.

The BIA's Superintendent for the Lower Brule Agency evaluated the Tribe's request under the factors set out in 25 C.F.R. 151.10 and recommended approval of the Tribe's request. App., *infra*, 37a. The BIA's Aberdeen Area Director also found the acquisition consistent with applicable agency regulations and recommended to the Assistant Secretary of the Interior for Indian Affairs that the Tribe's application be approved. *Id.* at 40a. On December 13, 1990, the Assistant Secretary for Indian Affairs, on behalf of the Secretary, formally approved the Tribe's request, subject to receipt of satisfactory evidence of title. *Id.* at 40a, 61a-62a. Respondents petitioned the Interior Board of Indian Appeals (IBIA) to review the Assistant Secretary's decision, but the IBIA dismissed the appeal. *Id.* at 2a; *South Dakota* v. *Aberdeen Area Director, Bureau of Indian Affairs*, 22 I.B.I.A. 126 (1992) (*reprinted at* App., *infra*, 55a-60a).[4]

3. On July 13, 1992, respondents filed a complaint in the United States District Court for the District of South Dakota against the Department of the Interior and other individual defendants challenging the Assistant Secretary's decision. App., *infra*, 2a. Invoking the APA, respondents contended that the Department's approval of the Tribe's application was arbitrary, capricious and an abuse of discretion. See

[4] The IBIA determined that it lacked "jurisdiction to review decisions made by the Assistant Secretary, which are final for the Department of the Interior unless the Assistant Secretary provides otherwise in his decision." App., *infra*, 58a-59a (citing 25 C.F.R. 2.6(c)).

5 U.S.C. 706(2)(A). They also argued that the approval violated the Tenth Amendment and the IRA. See Complaint 7-9 (July 13, 1992).

Respondents took no action, beyond the filing of the complaint, to prevent the transfer of the parcel into trust, and on November 30, 1992, the United States formally acquired title to the land in trust for the Tribe. See App., *infra*, 3a, 40a. More than one year later, on January 31, 1994, respondents filed an amended complaint that raised an additional constitutional challenge to Section 5. Respondents asserted that Section 5 "constitutes an unlawful delegation of legislative power from Congress to the Executive Branch and therefore the acquisition of land under this statute in this case was unlawful and unconstitutional." Amended Complaint 10 (Jan. 31, 1994).

In accordance with the federal government's position at that time, the Department moved to dismiss the action on the ground that the APA did not authorize judicial review. The Department argued that the decision whether to acquire land in trust under Section 5 is "committed to agency discretion by law," 5 U.S.C. 701(a)(2). See App., *infra*, 41a. The district court, however, did not reach that question. The court ruled, *sua sponte*, that it lacked jurisdiction to review the Secretary's decision to place the land in trust status because Congress had not waived the sovereign immunity of the United States with respect to disputes over title to Indian trust land. App., *infra*, 41a-46a, 51a.

The district court pointed out that "the APA waives sovereign immunity for review of administrative action only to the extent that another statute does not expressly or impliedly forbid suit." App., *infra*, 42a. See 5 U.S.C. 702 ("Nothing herein * * *

confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."). The court ruled that because the QTA waives the federal government's immunity from quiet title actions, but "does not apply to trust or restricted Indian lands," 28 U.S.C. 2409a(a), the APA preserves that immunity from suit in this case. App., *infra*, 42a-46a (following *Florida Dep't of Business Regulation* v. *United States Dep't of Interior*, 768 F.2d 1248 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986)).[5]

The district court determined that it did have jurisdiction to consider respondents' constitutional challenges, but it ruled that they were without merit. App., *infra*, 47a-51a. The court concluded that the Tenth Amendment does not limit Congress's power to take land into trust on behalf of Indian Tribes and that the acquisition in this case was consistent with that power. *Id.* at 47a-49a. The court also rejected respondents' argument that Section 5 of the IRA amounts to an unlawful delegation of legislative power. The court concluded that "the context in which [Section 5] was passed clearly delineates the general policy to be applied and the bounds of that delegated authority." *Id.* at 51a (citing *Mistretta* v. *United States*, 488 U.S. 361, 372-373 (1989)).

4. a. A divided court of appeals reversed the district court's decision. App., *infra*, 1a-30a. The court expressed "doubt whether the Quiet Title Act pre-

---

[5] The court noted that respondents (unlike the typical plaintiffs in a quiet title action) did not assert any ownership rights, but that their suit "would disrupt the trust relationship between the United States and Indians to the same extent as if [respondents] were asserting a property interest in the trust land." App., *infra*, 43a; see also *id.* at 45a-46a.

cludes APA review of agency action by which the United States *acquires* title." *Id.* at 4a n.1. But it concluded that it did not need to reach that issue. The court ruled that the QTA "does not bar claims 'that the Secretary acted unconstitutionally,'" *ibid.* (quoting *Florida Dep't of Business Regulation*, 768 F.2d at 1255 n.9), and it concluded that Section 5 is an unconstitutional delegation of legislative power, see *id.* at 4a-15a.

The court of appeals recognized that Article I of the Constitution, which vests Congress with all "legislative Powers herein granted," U.S. Const. Art. I, § 1, "does not prevent Congress from obtaining the assistance of its coordinate Branches." App., *infra*, 5a. And it noted this Court's repeated admonition that it is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Id.* at 6a (citations omitted). But the court believed that Section 5 "requires a particularly close look" because the federal government had argued in the district court that the Secretary of the Interior's decisions under Section 5 are "committed * * * entirely to agency discretion." *Ibid.*

The court of appeals concluded that Section 5, construed according to "its literal terms," is unconstitutional, because it "delegates unrestricted power to acquire land from private citizens for the private use and benefit of Indian tribes or individual Indians." App., *infra*, 7a. The court characterized Section 5 as containing "no 'intelligible principle,' no 'boundaries' by which the public use underlying a particular acquisition may be defined and judicially reviewed." *Id.* at 9a. The court acknowledged that the legislative history of Section 5 "suggests that Congress did not intend to delegate unrestricted power to acquire land 'for Indians.'" *Ibid.* But the court reasoned:

> Those who drafted [Section 5] failed to incorporate the limited purpose reflected in the legislative history. Presumably, they either drafted poorly or ignored the delegation issue. The agency that received this inartful delegation then used the absence of statutory controls to claim unrestricted, unreviewable power.

Id. at 14a. The court found it "hard to imagine a program more at odds with separation of powers principles." *Ibid.*

b. Judge Murphy dissented. App., *infra*, 15a-30a. She first observed that the majority should have adhered to the "cardinal principle" that courts resolve statutory questions respecting their jurisdiction and the availability of judicial review before "stretch[ing] to consider the constitutionality of the underlying statute." *Id.* at 16a. Judge Murphy pointed out that resolution of the APA issues could eliminate the need to address constitutional questions and would, at a minimum, "inform the analysis of the delegation issue." *Id.* at 16a-17a. She specifically criticized the majority for "rel[ying] on the Secretary's mere assertion that his decision is unreviewable to support its conclusion that the delegation is unlawful." *Id.* at 17a; see also *id.* at 22a.

Judge Murphy further expressed the view that even if it were appropriate to reach the constitutional issue, the majority's decision "strays far from the existing path of nondelegation doctrine." App., *infra*, 17a; see *id.* at 17a-19a (reviewing the case law).

She found the majority's analysis unpersuasive because it "invalidat[ed] a statute as an unlawful delegation based on the broadest possible reading of its terms," *id.* at 19a-20a, and it disregarded the limiting principles expressed through the IRA's historical context, the Act's legislative history, and the Department of the Interior's implementing regulations, *id.* at 20a-24a. Judge Murphy noted that the majority based its analysis on hypothetical situations (such as the purchase of "the Empire State Building in trust for a tribal chieftain as a wedding present") that bore no resemblance to the record before the court. *Id.* at 24a-25a. Rejecting the majority's reasoning, she concluded that Section 5 is a "principled and proper" delegation of authority. *Id.* at 26a.

Finally, Judge Murphy addressed the statutory issues that the majority had left undecided. Unlike the district court, she concluded that the QTA does not bar a judicial action that merely seeks review of the Department's administrative decision to take land into trust. App., *infra*, 26a-30a. Judge Murphy declined to state a definitive view on whether the Department's decision to take land in trust is committed to agency discretion. She concluded that the district court, which did not resolve that issue in its earlier decision, should address that issue in the first instance on remand. *Id.* at 30a.

5. The federal government filed a petition for rehearing with suggestion for rehearing en banc. The court of appeals denied that request. App., *infra*, 63a. Four of the eleven active members of that court dissented from the denial of rehearing en banc. *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals' holding that Section 5 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. 465, is unconstitutional invalidates an Act of Congress that, for more than 60 years, has played a central role in promoting tribal self-government and economic self-sufficiency. That ruling, which departs from this Court's decisions respecting the nondelegation doctrine, clearly warrants this Court's review.

Moreover, recent developments further undermine the ruling below. The court of appeals premised its decision on the assumption that the Secretary's decision to acquire land in trust is not subject to judicial review. Since the court rendered its decision, however, the Secretary has issued a regulation that acknowledges the availability of judicial review of such decisions and affords an opportunity for judicial review to be instituted before the land is actually taken in trust.

In these circumstances, we suggest that this case be remanded to the Secretary for reconsideration and entry of a new administrative decision that specifically discusses the factors identified in the Secretary's regulations as relevant to determinations under Section 5. If the Secretary decides to take the land at issue in trust, respondents may seek judicial review of that decision. The court in such an action may then consider any remaining nondelegation challenge that respondents might present, in light of the Secretary's implementing regulations and the availability of judicial review. But whether the Court remands the case for these purposes, or instead grants plenary review, the constitutional ruling below should not stand unreviewed.

1. The IRA is one of the most important congressional enactments affecting Indians, "equaled in

scope and significance only by the [Trade and Intercourse Act] of June 30, 1834, and the General Allotment Act of February 8, 1887." F. Cohen, *Handbook of Federal Indian Law* 84 (1942) (footnote omitted); Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 Mich. L. Rev. 955 (1972).[6] Section 5 is a central component of the IRA. For more than 60 years, Section 5 has provided the primary mechanism for the federal government to restore and replace tribal lands, which Congress concluded was crucial in promoting tribal self-government and economic self-sufficiency. See, *e.g.*, H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6-7 (1934); 78 Cong. Rec. 11,727, 11,730, 11,732 (1934) (statements of Rep. Howard).

The court of appeals' holding that Section 5 is unconstitutional presents an issue of fundamental importance. Under the court of appeals' view, the Secretary has no authority to take Indian land in trust, notwithstanding the express congressional au-

[6] The IRA can aptly be described as the cornerstone of modern federal law respecting Indians. Numerous statutes build on its fundamental policies of supporting tribal governments and protecting tribal lands. See 25 U.S.C. 450f *et seq.* (Indian Self-Determination Act), 2201 *et seq.* (Indian Land Consolidation Act), 2501 *et seq.* (Tribally Controlled Schools Act of 1988), 2601 *et seq.* (Indian Education Act of 1988), 2701 *et seq.* (Indian Gaming Regulatory Act), 2901 *et seq.* (Native American Languages Act), 3001 *et seq.* (Native American Graves Protection and Repatriation Act), 3101 *et seq.* (National Indian Forest Resources Management Act), 3301 *et seq.* (Higher Education Tribal Grant Authorization Act), 3501 *et seq.* (Energy Policy Act of 1992, Pub. L. No. 102-486, Tit. XXVI, 106 Stat. 3113), 3601 *et seq.* (Indian Tribal Justice Act), 3701 *et seq.* (American Indian Agricultural Resource Management Act), 3901 *et seq.* (Indian Lands Open Dump Cleanup Act of 1994).

thorization contained in Section 5. This Court has previously reviewed decisions involving the interpretation of the IRA, including decisions involving the application of Section 5. See *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973). The Court should likewise grant certiorari in this case, in which a court of appeals has declared that core provision of the IRA unconstitutional. See, *e.g.*, *United States* v. *Gainey*, 380 U.S. 63, 65 (1965) (granting certiorari "to review the exercise of the grave power of annulling an Act of Congress").

The decision below has great practical significance to the Secretary's day-to-day administration of the IRA. We have been informed by the Department of the Interior that there are 439 pending applications to the Secretary to take land in trust. The court of appeals' ruling calls into question the Secretary's authority to do so. In addition, the decision below calls into question thousands of acquisitions (covering an estimated 9 million acres) that the Secretary has made under Section 5 during the past 60 years. Challenges to such acquisitions might be raised in a broad range of cases in which the trust status of land may be relevant, including those concerning state and tribal taxation, land-use regulation, and law enforcement jurisdiction. See, *e.g.*, *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992) (state taxation of non-trust lands); *Brendale* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (zoning of non-Indian lands); 18 U.S.C. 1151 *et seq.* (federal prosecution of offenses occurring in "Indian country").[7]

[7] We do not concede, of course, that collateral attacks on the United States' trust title to land should be entertained in

Finally, the court of appeals' decision warrants this Court's review because it conflicts with the Court's established jurisprudence. As Judge Murphy correctly noted, and as we explain below, the majority's decision prematurely reaches a constitutional issue, departs from familiar principles governing constitutional adjudication, and ultimately "strays far from the existing path of nondelegation doctrine." App., *infra*, 17a.

2. "Judging the constitutionality of an Act of Congress is properly considered 'the gravest and most delicate duty that this Court is called upon to perform.'" *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985). The Court has accordingly admonished that before "reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision." *E.g.*, *Jean* v. *Nelson*, 472 U.S. 846, 854 (1985). That "fundamental rule of judicial restraint" expresses a "doctrine more deeply rooted than any other in the process of constitutional adjudication." *Ibid.* The court of appeals nevertheless elected to decide this case on the theory that Section 5 violates the nondelegation doctrine, without deciding the statutory issues that may have obviated the need for a constitutional ruling. See App., *infra*, 4a n.1.[8]

---

the sorts of cases cited in the text, but the prospect of numerous attempts to do so exacerbates the uncertainty occasioned by the court of appeals' constitutional ruling.

[8] As Judge Murphy explained in her dissent, "[r]esolution of the constitutional question would not be required if the merits of the APA claims were to be determined in favor of [respondents]." App., *infra*, 16a. And even if the constitutional issues could not have been avoided, an analysis of the APA issues—including the availability of judicial review—

The court of appeals not only reached the constitutional issue prematurely, but it also did not analyze that issue in light of the customary respect shown for "the duly enacted and carefully considered decision of a coequal and representative branch of our Government." *Walters*, 473 U.S. at 319. As this Court has explained, Congress may vest discretionary authority in Executive Branch officials so long as "Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta* v. *United States*, 488 U.S. 361, 372-373 (1989). In applying that standard, the courts must, by necessity, construe the underlying statute. But in doing so, the courts are obliged to observe the "cardinal principle" that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The court of appeals did not follow that course here. It instead concluded that it was obligated by its past precedents to construe Section 5 "as broadly as possible." App., *infra*, 13a.[9]

---

would have "inform[ed] the analysis of the delegation issue since the availability of judicial review of an agency action is relevant in determining whether the authorizing statute is a lawful delegation." *Id.* at 17a. See *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 219 (1989).

[9] The court of appeals' approach is a clear departure from this Court's practice. As the Court observed in *Mistretta*:

> In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.

488 U.S. at 373 n.7.

Furthermore, in yet another departure from this Court's settled practice, the court of appeals based its analysis on extremely unlikely hypothetical situations, rather than on the circumstances presented by this case or the Secretary's administration of Section 5 generally. See App., *infra*, 7a-9a. As this Court has stated, "[t]he fact that [a legislative] Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). The court of appeals nevertheless relied on conjecture and its own speculative assessment of "opportunities for abuse" (App., *infra*, 13a) in other settings, without regard to the specific facts presented by this case.

Having departed from the orderly process of constitutional adjudication, the court of appeals reached the extraordinary conclusion on the merits that Section 5 of the IRA violates the nondelegation doctrine, notwithstanding the more than 60 years of experience in acquiring land in trust under its authority. That decision is contrary to the numerous rulings of this Court, which have consistently upheld broader grants of authority to Executive officials. See *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 219 (1989). The Court's decision in *Skinner* cites pertinent examples (*id.* at 218-219): *Lichter* v. *United States*, 334 U.S. 742, 778-786 (1948) (War Department authorized to recover "excessive profits" earned on military contracts); *Yakus* v. *United States*, 321 U.S. 414, 420 (1944) (Price Administrator authorized to fix prices of commodities that "will be generally fair and equitable and will effectuate the purposes" of the congressional enactment); *FPC* v. *Hope*

Natural Gas Co., 320 U.S. 591, 600-601 (1944) (Federal Power Commission authorized to determine just and reasonable rates); *NBC* v. *United States*, 319 U.S. 190, 225-226 (1943) (Federal Communications Commission authorized to regulate broadcast licensing as the "public interest, convenience, or necessity" require).

"Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Touby* v. *United States*, 500 U.S. 160, 165 (1991). Like the statutes involved in the foregoing cases, Section 5 of the IRA is constitutional because it provides "an intelligible principle to which the person or body authorized to [exercise the statutory authority] is directed to conform." *Mistretta*, 488 U.S. at 372 (quoting *J.W. Hampton Jr. & Co.* v. *United States*, 276 U.S. 394, 409 (1928)). As in the foregoing cases, the "intelligible principle" is found here by examining the terms of the challenged provision in light of "the purpose of the Act, its factual background and the statutory context in which they appear." *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 104 (1946).

As this Court has explained, Congress enacted the IRA to restore and promote Indian self-government and economic self-sufficiency. See *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. at 154. It fashioned the Act specifically to reverse the "disastrous" effects of the General Allotment Act, which had weakened tribal organizations and had resulted in the wholesale loss of tribal lands. See *Hodel* v. *Irving*, 481 U.S. 704, 706 (1987). Those objectives are expressed in the

IRA's preamble (ch. 576, 48 Stat. 984) and embodied throughout its provisions, which create an integrated framework that is designed to fulfill "Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development.'" *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983); *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143 (1980).

Section 5 is an integral part of the IRA. The IRA's objectives and corollary provisions accordingly provide the "intelligible principle[s]" that limit Section 5's reach. Section 5 authorizes the Secretary of the Interior to acquire land in trust, in accordance with the complementary provisions of the IRA, to support Indian self-government and economic development. See, *e.g.*, *Jones*, 411 U.S. at 157 (noting that the Mescalero Apache Tribe acquired land "beyond its reservation borders for the purpose of carrying on a business enterprise as anticipated by [Sections 16 and 17] of the Act").

The court of appeals is accordingly mistaken in concluding that Section 5 grants the Secretary unbounded authority to acquire land "for Indians" without regard to the purpose of the acquisition. App., *infra*, 7a-9a, 11a. To the contrary, it allows the Secretary to acquire land in circumstances such as the situation presented here, where the Tribe seeks to develop an industrial park to promote tribal economic enterprise and vocational opportunities. The court's conjecture that Section 5 would, for example, "permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present" (*id.* at 7a) is not only far-fetched, but manifestly wrong.[10]

[10] The legislative history confirms that Section 5 does not contain a boundless delegation of authority, but instead provides a mechanism for restoring and replacing trust lands that were lost through the allotment program, and for facilitating the economic enterprise to which the IRA as a whole is directed. S. Rep. No. 1080, 73d Cong., 2d Sess. 1-2 (1934); accord H.R. Rep. No. 1804, *supra*, at 1, 6-7.

The Secretary of the Interior has recognized that Section 5 does not confer boundless discretion. He has promulgated implementing regulations that articulate specific factors governing the exercise of his authority. See 25 C.F.R. Pt. 151; page 6, *supra*. By setting out ascertainable standards that govern his trust acquisition decisions, the Secretary has not only observed, but has given concrete expression to, the IRA's limiting principles. These regulations, which are described in Judge Murphy's dissent, App., *infra*, 24a n.2, confine the Secretary's exercise of Section 5 authority within constitutional bounds.[11]

3. Although the Court should grant the petition for a writ of certiorari, it might conclude that plenary review is not necessary at this time. Intervening developments suggest that a remand would be appropriate.

The court of appeals identified the availability of judicial review of the Secretary's trust acquisitions

[11] Significantly, Congress conducts regular oversight of the Secretary's activities, and it has revisited and amended the IRA since the promulgation of those regulations. See Indian Reorganization Act Amendments of 1994, Pub. L. No. 103-263, § 5(b), 108 Stat. 709; Indian Reorganization Act Amendments of 1990, Pub. L. No. 101-301, § 3(b) and (c), 104 Stat. 207; Indian Reorganization Act Amendments of 1988, Pub. L. No. 100-581, Tit. I, § 101, 102 Stat. 2938; see also Indian Land Consolidation Act, 25 U.S.C. 2201 *et seq.* (extending, through 25 U.S.C. 2202, Section 5's reach to all Tribes). Congress has not expressed any disapproval of the Secretary's understanding of his Section 5 authority.

as an important factor bearing on the constitutional nondelegation issue presented here. App., *infra*, 6a; see also *Skinner*, 490 U.S. at 219; *American Power & Light Co.*, 329 U.S. at 105; *Touby*, 500 U.S. at 170 (Marshall, J., concurring). Accordingly, as Judge Murphy explained in dissent (App., *infra*, 22a), the court should have squarely resolved whether judicial review is available before reaching the constitutional question. But it did not do so. Instead, the court of appeals merely assumed that a decision by the Secretary under Section 5 to take land in trust "is not subject to judicial review under the APA because it is 'committed to agency discretion.'" App., *infra*, 11a; see *id.* at 6a, 14a. The federal government made such an argument in the lower courts, and the court of appeals based its assumption of non-reviewability on the government's argument.[12] The federal government has since abandoned the position on which the court of appeals based its assumption, and the Secretary of the Interior has issued a final regulation that acknowledges and affords an opportunity for judicial review of his Section 5 decisions. See *id.* at 64a-69a.[13] Under these circumstances, it would be

---

[12] See App., *infra*, 6a (stating that the constitutional issue "requires a particularly close look" because "the Secretary argued to the district court that his actions under [Section 5] may not be judicially reviewed").

[13] The regulation (to be codified at 25 C.F.R. 151.12(b)) states:

> Following completion of the Title Examination provided in § 151.13 of this part and the exhaustion of any administrative remedies, the Secretary shall publish in the Federal Register, or in a newspaper of general circulation serving the affected area[,] a notice of his/her decision to take land into trust under this part. The notice will state that a final agency determination to take land in trust has been made and that the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published.

App., *infra*, 68a-69a. As explained in the preamble, the regulation "ensures that [judicial] review is available before formal conveyance of title to land to the United States, when the QTA's bar to judicial review becomes operative." *Id.* at 66a.

appropriate for this Court to grant the petition, vacate the judgment of the court of appeals, and remand the case in light of that development. See 28 U.S.C. 2106.[14]

We further suggest such a remand be made with instructions that the judgment of the district court sustaining the Secretary's decision also be vacated and that the matter, in turn, be remanded to the Secretary of the Interior for reconsideration and issuance of a new administrative decision. Such a new decision by the Secretary could specifically address the factors that the Secretary's implementing regulations require to be considered in making deter-

---

[14] The Court has followed that course in a variety of contexts, including cases presenting new or changed administrative interpretations of federal statutes, see, *e.g.*, *Lawrence* v. *Chater*, 116 S. Ct. 604, 607 (1996) (per curiam); *Schmidt* v. *Espy*, 115 S. Ct. 43 (1994); *City of Chicago* v. *Environmental Defense Fund*, 113 S. Ct. 486, 487 (1992), and confessions of error or other positions newly taken by the Solicitor General, see, *e.g.*, *Wells* v. *United States*, 114 S. Ct. 1609 (1994); *Reed* v. *United States*, 114 S. Ct. 1289 (1994); *Chappell* v. *United States*, 494 U.S. 1075 (1990); *Polsky* v. *Wetherill*, 403 U.S. 916 (1971).

minations under Section 5.[15] If the Secretary decides to acquire the land at issue here in trust, respondents may then seek judicial review of that decision. In such an action, the court not only could consider whether the Secretary's decision was consistent with Section 5 and the implementing regulations, but also could address any nondelegation argument respondents might then raise in light of those regulations and the availability of judicial review.[16]

If the Court does not dispose of the case in this manner, however, it should set the case for plenary consideration. The court of appeals has held an Act of Congress unconstitutional, and that holding is of broad and critical importance in the day-to-day administration of Indian affairs and the self-governance and economic development of Indian Tribes.

---

[15] Under the government's former position that the Secretary's decision was not subject to judicial review, there was no occasion for the Secretary's 1992 decision at issue here to contain a discussion of those factors.

[16] If the judgment of the court of appeals were vacated but the judgment of the district court were allowed to stand, title presumably would be in the United States pursuant to the Secretary's decision that the district court sustained. The result would be to present the question in further judicial proceedings below of whether the Quiet Title Act precludes some or all judicial review after title has vested in the United States. Vacatur of the district court's judgment and remand of the matter to the Secretary for a new decision (which would in turn be subject to judicial review under the APA *before* title passed to the United States) would obviate any need to consider that QTA/preclusion question.

CONCLUSION

The petition for a writ of certiorari should be granted. The judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals with instructions to vacate the judgment of the district court and remand the matter to the Secretary of the Interior for reconsideration of his administrative decision. In the alternative, the Court should grant plenary review and set the case for briefing and argument.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

EDWARD J. SHAWAKER
ANNE S. ALMY
LISA E. JONES
Attorneys

JOHN D. LESHY
Solicitor
Department of the Interior

JUNE 1996

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2344

STATE OF SOUTH DAKOTA;
CITY OF OACOMA, SOUTH DAKOTA,
PLAINTIFFS-APPELLANTS

v.

UNITED STATES DEPARTMENT OF THE INTERIOR;
EDDIE F. BROWN,
Assistant Secretary—Indian Affairs;
JERRY JAEGER, Acting Area Director,
Bureau of Indian Affairs,
DEFENDANTS-APPELLEES

Submitted Feb. 15, 1995

Decided Nov. 7, 1995

Before: MAGILL, LOKEN, and MURPHY, Circuit Judges.

LOKEN, Circuit Judge.

The State of South Dakota and the City of Oacoma, South Dakota, appeal the district court's dismissal of their challenge to the Secretary of the Interior's acquisition of commercial land in trust for the Lower Brule Tribe of Sioux Indians. Concluding that 25

U.S.C. § 465, the statute authorizing acquisition of the land, is an unconstitutional delegation of legislative power, we reverse.

I.

In March 1990, the Tribe submitted an application under 25 U.S.C. § 465, asking the Secretary to acquire ninety-one acres of land in trust for use by the Tribe. The land is located seven miles from the Tribe's reservation and is partially within the City of Oacoma. The Tribe stated that the land would be used to create an industrial park adjacent to an interstate highway, explaining that "[t]his site, Trust status for the land, and tax advantages are critically necessary for the development to occur."

The State of South Dakota and the City of Oacoma protested in writing to the Secretary's Bureau of Indian Affairs ("BIA"). When BIA's Area Director notified the State and the City in March 1991 that the Tribe's application would be approved, they appealed to the Interior Board of Indian Affairs. BIA then disclosed that the Assistant Secretary for Indian Affairs had approved the application in December 1990, without notifying the protestants. The Board dismissed the appeal because it has no jurisdiction to review decisions by the Assistant Secretary. *State of South Dakota & Town of Oacoma v. Aberdeen Area Director, BIA*, 22 I.B.I.A. 126 (1992).

In July 1992, the State and the City filed this action against the Department of the Interior and certain of its officials seeking judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701-706. For convenience, we will refer to the defendants collectively as "the Secretary," because he is the Executive Branch official authorized to act under § 465.

We will refer to the State and the City collectively as "plaintiffs."

Plaintiffs allege that they are aggrieved by the Secretary's acquisition because it deprives them of tax revenues and may place the land beyond their regulatory powers. They contend that the acquisition is invalid because § 465 is an unconstitutional delegation of legislative power. Alternatively, they contend (i) that the agency violated its internal rules of procedure and the Assistant Secretary acted beyond the scope of his delegated authority; (ii) that the approval was arbitrary and capricious and not in accordance with the agency's governing regulations, *see* 25 C.F.R. §§ 151.1-14; and (iii) that the Tribe plans to develop the land as a gaming casino and the Secretary was aware of the Tribe's true intentions but failed to comply with the approval procedures of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721.

In November 1992, the Secretary took title to the lands in trust for the Tribe. In January 1994, the Secretary moved to dismiss on the ground that a § 465 acquisition is action "committed to agency discretion by law" and therefore not subject to judicial review. *See* 5 U.S.C. § 701(a)(2); *Heckler v. Chaney*, 470 U.S. 821, 828-30, 105 S.Ct. 1649, 1654-55, 84 L.Ed.2d 714 (1985). The district court granted the motion to dismiss, concluding that § 465 is not an unconstitutional delegation of legislative power because the statute identifies the agency to which power is delegated and "clearly delineates the general policy to be applied and the bounds of that delegated authority." Without reaching the "committed to agency discretion" issue, the court also held, *sua sponte*, that it had no jurisdiction to review

plaintiffs' other claims because the Quiet Title Act, 28 U.S.C. § 2409a, which permits the United States to be sued to resolve real property disputes, "does not apply to trust or restricted Indian lands." [1]

II.

On appeal, plaintiffs argue that § 465 provides no legislative standards or boundaries governing the Secretary's acquisitions. The Secretary responds that the statutory purpose of "providing land for Indians" sufficiently defines the general policy and boundaries of the delegated power. The Secretary notes that the Supreme Court has not invalidated a federal statute on delegation grounds since *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542, 55 S.Ct. 837, 848, 79 L.Ed. 1570 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935). Interestingly, the same Congress enacted both the Indian Reorganization Act, of which § 465 was a part, and the statutes invalidated in *Schechter Poultry* and *Panama Refining*. It is appropriate to consider whether § 465 satisfies the nondelegation doctrine as it has evolved since 1935, particularly because no other appellate court has done so.[2]

---

[1] The court relied on *State of Florida v. United States Dep't of the Interior*, 768 F.2d 1248 (11th Cir.1985), *cert. denied*, 475 U.S. 1011, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1986). *Contra*, *City of Sault Ste. Marie v. Andrus*, 458 F.Supp. 465, 470-72 (D.D.C.1978). We doubt whether the Quiet Title Act precludes APA review of agency action by which the United States *acquires* title. But given our conclusion that § 465 is an unconstitutional delegation of power, we need not decide this issue. The court in *Florida* conceded that the Quiet Title Act does not bar claims "that the Secretary acted unconstitutionally or beyond his statutory authority when the United States acquired title to the land." 768 F.2d at 1255 n. 9.

The nondelegation doctrine is easy to state: "Congress may not constitutionally delegate its legislative power to another branch of Government." *Touby v. United States*, 500 U.S. 160, 165, 111 S.Ct. 1752, 1755, 114 L.Ed.2d 219 (1991) (citation omitted). It is difficult to apply. A court must inquire whether Congress "has itself established the standards of legal obligation, thus performing its essential legislative function." *Schechter Poultry*, 295 U.S. at 530, 55 S.Ct. at 843. But the court must be mindful that the doctrine does not prevent Congress from obtaining the assistance of its coordinate Branches. Therefore, so long as Congress "lay[s] down by legislative act an intelligible principle" governing the exercise of delegated power, it has not unlawfully delegated its legislative power. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409, 48 S.Ct. 348, 352, 72 L.Ed. 624 (1928), quoted in *Touby*, 500 U.S. at 165, 111 S.Ct. at 1755, and *Mistretta v. United States*, 488 U.S. 361, 372, 109 S.Ct. 647, 655, 102 L.Ed.2d 714 (1989). A delegation is overbroad "[o]nly if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Yakus v. United States*, 321 U.S. 414, 426, 64 S.Ct. 660, 668, 88 L.Ed. 834 (1944).

---

[2] To our knowledge, only one other district court has considered the nondelegation question in the sixty-year life of the statute, and its perfunctory analysis is unpersuasive. *See City of Sault Ste. Marie*, 458 F.Supp. at 473.

The Supreme Court has recognized that judicial review is a relevant safeguard in considering delegation issues:

> It is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations."

Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 219, 109 S.Ct. 1726, 1731, 104 L.Ed.2d 250 (1989), *quoting American Power & Light Co. v. SEC*, 329 U.S. 90, 105, 67 S.Ct. 133, 142, 91 L.Ed. 103 (1946). Justice Marshall eloquently stated this principle in his concurring opinion in *Touby:* "judicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds." 500 U.S. at 170, 111 S.Ct. at 1758. Thus, when the Secretary argued to the district court that his actions under § 465 may not be judicially reviewed *because the statute commits them entirely to agency discretion*, he implicitly acknowledged that this delegation issue requires a particularly close look. *See United States v. Garfinkel*, 29 F.3d 451, 459 (8th Cir.1994) ("[J]udicial review is a factor weighing in favor of upholding a statute against a nondelegation challenge") (citation omitted).

We begin by examining the very broad language of § 465:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire . . . any interest in lands . . . within or without existing

> reservations . . . for the purpose of providing land for Indians.
>
> * * * * *
>
> Title to any lands or rights acquired . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

By its literal terms, the statute permits the Secretary to purchase a factory, an office building, a residential subdivision, or a golf course in trust for an Indian tribe, thereby removing these properties from state and local tax rolls. Indeed, it would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present. There are no perceptible "boundaries," no "intelligible principles," within the four corners of the statutory language that constrain this delegated authority—except that the acquisition must be "for Indians." It delegates unrestricted power to acquire land from private citizens for the private use and benefit of Indian tribes or individual Indians.

The Secretary's power to purchase land under § 465 triggers the complementary power to acquire land by condemnation under 40 U.S.C. § 257. *See United States v. 29 Acres of Land*, 809 F.2d 544, 545 (8th Cir.1987). It is therefore appropriate to consider the delegation question in the context of the federal government's extensive condemnation powers.

The power to acquire land by condemnation for a public purpose is an inherent aspect of sovereignty. *See Kohl v. United States*, 91 U.S. 367, 371-72, 23

L.Ed. 449 (1875). In exercising that power, Congress need not select the particular land to be taken; that function may be delegated to the Executive Branch. *See Chappell v. United States*, 160 U.S. 499, 510, 16 S.Ct. 397, 400, 40 L.Ed. 510 (1896). So long as the condemnation serves a public use, "the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance." *Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406, 25 L.Ed. 206 (1878). However, "a claim that a taking is not 'for public use' is open for judicial consideration." *United States ex rel. T.V.A. v. Welch*, 327 U.S. 546, 557, 66 S.Ct. 715, 720, 90 L.Ed. 843 (1946) (Frankfurter, J., concurring).

It is settled that the United States may purchase land by condemnation for an Indian reservation as a public use. *See United States v. McGowan*, 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410 (1938); *State of Minnesota v. United States*, 125 F.2d 636, 640 (8th Cir.1942). That same power authorizes Congress to acquire non-reservation lands in trust for a public use that benefits Indians or Indian tribes. But the question under the nondelegation doctrine is, for what public use does § 465 authorize the Secretary to acquire land. By defining no boundaries to the exercise of this power, the statute leaves the Secretary free to acquire for a multitude of purposes, for example, to expand a reservation,[8] to provide

[8] A separate provision of the Indian Reorganization Act specifically authorized the Secretary to acquire lands to form new reservations or to enlarge existing reservations. *See* 25 U.S.C. § 467. In *State of Minnesota, supra*, we upheld a condemnation under a different, far more specific statute after careful judicial review of the Secretary's decision.

farm land for rural Indians, to provide a factory for unemployed urban Indians, to provide a golf course for tribal recreation, or to provide a lake home for a politically faithful tribal officer. These are very different public uses, and the last is, of course, no public use at all.

Despite the government's broad, inherent power to acquire land for public use, the nondelegation doctrine surely requires at a minimum that Congress, not the Executive, articulate and configure the underlying public use that justifies an acquisition. In some cases, the public use underlying each acquisition is obvious, as when Congress authorizes an agency to acquire lands and buildings to house the agency's operations. But when Congress authorizes the Secretary to acquire land in trust "for Indians," it has given the agency no "intelligible principle," no "boundaries" by which the public use underlying a particular acquisition may be defined and judicially reviewed. This legislative vacuum in turn greatly expands the extent of the standardless delegation.

III.

The legislative history of § 465 suggests that Congress did not intend to delegate unrestricted power to acquire land "for Indians." The statute was enacted as section 5 of the Indian Reorganization Act of 1934, 48 Stat. 985. The Report of the Committee on Indian Affairs stated:

> The bill now under consideration definitely puts an end to the allotment system through the operation of which the Indians have parted with 90,000,000 acres of their land in the last 50 years. . . . To make many of the now pauperized,

landless Indians self-supporting, it authorizes a long term program of purchasing land for them.

* * * * *

Section 5 authorizes the Secretary of the Interior to purchase or otherwise acquire land for landless Indians.

The title to land thus acquired will remain in the United States. The Secretary may permit the use and occupancy of this newly acquired land by landless Indians; he may loan them money for improvements and cultivation, but the continued occupancy of this land will depend on its beneficial use by the Indian occupant and his heirs.

H.R.Rep. No. 1804, 73d Cong., 2d Sess. 6-7 (1934). In the House floor debate, Representative Howard, a chief sponsor of the bill, further explained the purpose of section 5:

> Section 5 sets up a land acquisition program to provide land for Indians who have no land or insufficient land, and who can use land beneficially . . . . This program would permit the purchase of land for many bands and groups of landless Indians and would permit progress toward the consolidation of badly checkerboarded Indian reservations, as well as provide additional agricultural land to supplement stock grazing or forestry operations.

78 Cong.Rec. 11730 (June 15, 1934). Representative Howard characterized the acquisition of trust lands to be used for farming as "the keystone of the new Indian policy." 78 Cong.Rec. 11729. Representative

Hastings described the land to be acquired as "Indian subsistence-homesteads." *Id.* at 9269.

This agrarian focus is not surprising in a Congress acting against the backdrop of an industrial sector ravaged by the Great Depression. Yet in drafting § 465, Congress failed to include standards to reflect its limited purpose. Instead, the Secretary was delegated unrestricted power to acquire land "for Indians" in a statute that contained no "boundaries" defining how that power should be exercised. The Secretary has responded by asserting all of the unlimited power conferred by the statute's literal language. First, he promulgated regulations that place no restrictions on the purpose for which land may be placed in trust "for Indians." *See* 25 C.F.R. § 151.10. Second, when his acquisition procedures and decisions were challenged in court, he asserted that his exercise of this power is not subject to judicial review under the APA because it is "committed to agency discretion."

This case illustrates the problems created by the exercise of such unrestricted power. Intending only that the Secretary acquire rural lands suitable for farming, grazing, and logging by Indians, Congress in § 465 addressed only one intergovernmental issue —it made the lands taken in trust exempt from state and local property taxes. But when the Secretary acquires urban land for industrial or commercial uses, other important issues inevitably arise. For example, the South Dakota Attorney General asked the Secretary whether the City of Oacoma's ordinances, including its zoning ordinances, would be enforceable against the property if it was taken in trust. The Secretary's Field Solicitor responded:

> If the parcel is not declared to be part of the reservation, then ordinances which are civil or regulatory in nature and which do not affect the proprietary interest of the United States, acquired by virtue of acquisition of title to the land, *may* apply. *See State of Florida, supra; Mescalero Apache Tribe v. Jones*, [411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973)].

(Emphasis added.) This answer suggests that the BIA will force the State and the City to establish their right to regulate the trust land in court, where BIA will no doubt argue that state and local regulatory powers are preempted. The result is a legislative void. Congress, not the BIA, and indeed not the courts, should define in the first instance the extent to which lands taken in trust for industrial and commercial Indian use are thereby freed from state and local zoning ordinances, building codes, health and safety regulations, and other exercises of the police power.

Had the Secretary acted consistently with § 465's legislative history—by limiting his acquisition authority to purposes such as forming or enlarging reservations, restoring alienated allotment lands, and providing other lands for agrarian uses—we would face the question whether the statute's over-breadth was suitably slimmed by this legislative history and agency interpretation. Normally, delegation questions are considered in light of a statute's legislative history and context, *see Garfinkel*, 29 F.3d at 458, and any narrowing agency interpretations, *see International Union, UAW v. OSHA*, 938 F.2d 1310 (D.C.Cir.1991); 37 F.3d 665 (D.C.Cir.1994) (decision after remand). But in this case, the agency

has interpreted the statute as broadly as possible, consistent with its literal language. We have approved that interpretation in another context and as a panel may not overrule a prior panel opinion. *See Chase v. McMasters*, 573 F.2d 1011, 1015-16 (8th Cir.1978), *cert. denied*, 439 U.S. 965, 99 S.Ct. 453, 58 L.Ed.2d 423 (1978). Moreover, if we now took a more limited view of the statute, the Secretary's regulations would be overbroad, and there would be no basis upon which to uphold this acquisition. Thus, we conclude that we must accept the agency's interpretation and construe the statute literally for purposes of applying the nondelegation doctrine.

IV.

There are additional, procedural aspects of the Secretary's acquisition program that further support our decision. The administrative record reveals that the Tribe purchased the land in question for $80,255.94, three months *after* it filed the § 465 application, and after the BIA's Lower Brule Agency had recommended favorable action on the application. The record does not disclose (i) whether the purchase price was based upon tax free commercial use by the Tribe, and (ii) the price the United States paid when it acquired the land from the Tribe in November 1992. Plaintiffs criticize the administrative record as contrived and inadequate. The Secretary argues that procurement practices of the Tribe and BIA under § 465 are not subject to judicial review.

There are many opportunities for abuse in a program of this nature. For example, a seller who knows that land is being sold for a tax free use will charge more for that land, thereby capturing some of the economic benefit of tax free status that Con-

gress intended for the Indians. Here, if the Tribe paid such a monopoly rent, the congressional purpose has been frustrated. But if the Secretary reimbursed the Tribe for that purchase price, the taxpayers have suffered from agency ignorance or misfeasance. Given the extensive standards that Congress has built into other procurement programs, *see, e.g.*, 10 U.S.C. Ch. 159; 41 U.S.C. §§ 251-260, the total absence of procurement principles and safeguards in § 465 violates the nondelegation doctrine.

V.

Those who drafted § 465 failed to incorporate the limited purpose reflected in the legislative history. Presumably, they either drafted poorly or ignored the delegation issue. The agency that received this inartful delegation then used the absence of statutory controls to claim unrestricted, unreviewable power. The result is an agency fiefdom whose boundaries were never established by Congress, and whose exercise of unrestrained power is free of judicial review. It is hard to imagine a program more at odds with separation of powers principles.

In his concurring opinion in *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 685-86, 100 S.Ct. 2844, 2886, 65 L.Ed.2d 1010 (1980), Justice (now Chief Justice) Rehnquist summarized the functions of the nondelegation doctrine as articulated in prior Supreme Court cases:

> First, and most abstractly, it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will.

> Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the delegated discretion. Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated discretion will be able to test that exercise against ascertainable standards.

(Citations omitted.) We conclude that § 465 fails all three of these nondelegation criteria and is invalid. Accordingly, the Secretary had no authority to acquire the lands in question in trust for the Tribe. The judgment of the district court is reversed and the case is remanded for further proceedings consistent with this opinion.

MURPHY, Circuit Judge, dissenting.

The court in this case unnecessarily reaches a constitutional issue and bases its conclusions on speculation rather than the record. Its decision that a portion of the Indian Reorganization Act of 1934, 25 U.S.C. § 465, is an unconstitutional delegation of legislative power is not supported by the statute or its legislative history. The court invalidates today a congressional enactment designed to acquire land in trust for Indians that has been in place for over sixty years and, in the process, places in doubt the status of all Indian trust land. I must therefore dissent.

I.

The primary focus of the appeal taken by the State of South Dakota and the City of Oacoma (plaintiffs) is the district court's dismissal for lack of jurisdiction

of their claims brought under the Administrative Procedure Act (APA), 5 U.S.C. § 701-706. The Department of the Interior and the two individually named defendants (collectively, the Secretary) had argued on their motion to dismiss that judicial review of the APA claims is unavailable because the decision whether to acquire land in trust is committed to agency discretion. Plaintiffs disagreed and also challenged the constitutionality of the statute authorizing land to be taken into trust, § 465 of the Indian Reorganization Act. The district court found the statute to be constitutional and did not reach the issue of the availability of judicial review. Instead it concluded sua sponte that it lacked jurisdiction over the APA claims because the United States has not waived its sovereign immunity for claims relating to Indian trust land.

Rather then addressing the jurisdictional issue, the majority stretches to consider the constitutionality of the underlying statute. A cardinal principle guiding federal courts is that constitutional issues should not be reached unless necessary to a decision. *Jean v. Nelson*, 472 U.S. 846, 854, 105 S.Ct. 2992, 2996-97, 86 L.Ed.2d 664 (1985). This is a "fundamental rule of judicial restraint." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 467 U.S. 138, 157, 104 S.Ct. 2267, 2279, 81 L.Ed.2d 113 (1984). The court suggests, but does not decide, that the district court had jurisdiction to consider the claims brought under the APA. If so, the principle of judicial restraint should lead to consideration of those claims prior to reaching any constitutional issue. Resolution of the constitutional question would not be required if the merits of the APA claims were to be determined in favor of the plaintiffs.

Moreover, resolution of the APA inquiry could inform the analysis of the delegation issue since the availability of judicial review of an agency action is relevant in determining whether the authorizing statute is a lawful delegation. *See United States v. Garfinkel*, 29 F.3d 451, 459 (8th Cir.1994). Although the court recognizes this principle, it relies on the Secretary's mere assertion that his decision is unreviewable to support its conclusion that the delegation is unlawful.

II.

Even if the court had reason to address the delegation issue at this time, its decision strays far from the existing path of nondelegation doctrine. Congressional delegations of legislative power are valid "if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372-73, 109 S.Ct. 647, 655, 102 L.Ed.2d 714 (1989) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105, 67 S.Ct. 133, 142, 91 L.Ed. 103 (1946)). To assess whether a statute imposes sufficient boundaries on the delegated authority, a reviewing court looks at the language of the statute, its purpose and factual background, and the statutory context in which the standards appear. *United States v. Garfinkel*, 29 F.3d 451, 458 (8th Cir.1994) (citing *American Power & Light Co. v. SEC*, 329 U.S. 90, 104, 67 S.Ct. 133, 141-42, 91 L.Ed. 103 (1946)). A statute written in broad terms does not violate the Constitution so long as Congress lays down an "intelligible principle" to guide the agency's discretion. *Touby v. United States*, 500 U.S. 160, 165, 111 S.Ct. 1752, 1755-56, 114 L.Ed.2d 219 (1991); *Garfinkel*, 29 F.3d at 457.

Only twice in its history, and not since 1935, has the Supreme Court invalidated a statute on the ground of excessive delegation of legislative authority. Since 1935, the Supreme Court has consistently upheld statutes involving broad delegations of authority. *See e.g., Mistretta v. United States*, 488 U.S. 361, 372-73, 109 S.Ct. 647, 654-55, 102 L.Ed.2d 714 (1989) (authority to promulgate sentencing guidelines for federal criminal offenses); *Lichter v. United States*, 334 U.S. 742, 785-86, 68 S.Ct. 1294, 1316-17, 92 L.Ed. 1694 (1948) (authority to determine excessive profits); *American Power & Light Co. v. SEC*, 329 U.S. 90, 67 S.Ct. 133, 91 L.Ed. 103 (1946) (authority to prevent unfair or inequitable distribution of voting power among security holders); *Yakus v. United States*, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944) (authority to fix commodity prices that would be fair and equitable and would effectuate purpose of Emergency Price Control Act of 1942); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 600, 64 S.Ct. 281, 286-87, 88 L.Ed. 333 (1944) (authority to determine just and reasonable rates); *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26, 63 S.Ct. 997, 1013, 87 L.Ed. 1344 (1943) (authority to regulate broadcast licensing for "public interest, convenience, or necessity"). The delegation doctrine has in fact evolved into a tool of statutory construction, by which reviewing courts give "narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." *See Mistretta*, 488 U.S. at 373 n. 7, 109 S.Ct. at 655 n. 7.

Although the court notes that the same Congress passed the Indian Reorganization Act and the statutory provisions found unconstitutional in 1935 on

delegation grounds, it does not attend to the striking differences between the statutes. The National Industrial Recovery Act (NIRA), 48 Stat. 195 (1933),[1] contained the unconstitutional provisions struck down in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 531, 55 S.Ct. 837, 843-44, 79 L.Ed. 1570 (1935) (provision authorizing the President to approve codes of fair competition for a trade or industry) and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 406, 55 S.Ct. 241, 242, 79 L.Ed. 446 (1935) (provision granting the President discretion to prohibit interstate and foreign commerce of certain petroleum products). The NIRA represented the Roosevelt administration's response to a national emergency caused by widespread unemployment and economic disruption during the Depression. *See* 48 Stat. 195, Title I, section 1. It granted the President unfettered discretion to approve any law, and impose his own conditions on it, relating to a "vast array of commercial and industrial activities throughout the country." *Schechter*, 295 U.S. at 539, 55 S.Ct. at 847. The Indian Reorganization Act in contrast did not convey such unbridled discretion to another branch, and it is one of a long line of enactments reflecting the special role the federal government has played with respect to Indian tribes. *See* F. Cohen, *Handbook of Federal Indian Law* 68-88 (reprint ed. 1988) (reviewing federal Indian legislation starting from 1789).

The court today departs from precedent like *Mistretta* by invalidating a statute as an unlawful

---

[1] This statute was later amended by 49 Stat. 375 (1935), which repealed the provisions relating to codes of fair competition and provided for the expiration of Title I of the Act in 1936.

delegation based on the broadest possible reading of its terms. In the course of its discussion, it focuses on unlikely hypothetical uses of the Secretary's delegated authority and ignores the limiting effect of the context in which the statute was passed.

Prior to 1934, Congress pursued an allotment policy with regard to Indian land. *See id.* at 78-83. Existing Indian tribal land was allotted to individual Indians, and surplus lands were sold to whites. Although the purpose of the policy was to encourage assimilation, it resulted most significantly in the loss of Indian land as individual allotments were sold to non-Indians, lost through tax forfeiture or otherwise alienated. *See Shangreau v. Babbitt*, 68 F.3d 208 (8th Cir.1995). Between 1887 and 1934, Indian land holdings were reduced from 138 million acres to 48 million, a loss of 90 million acres. F. Cohen, *Handbook of Federal Indian Law* 138 (1982 ed.).

Discontent with the allotment policy caused Congress to enact the Indian Reorganization Act of 1934, 25 U.S.C. § 461-479, to stem the loss of Indian lands and to assist Indians in acquiring land adequate for self-support. *See Chase v. McMasters*, 573 F.2d 1011, 1016 (8th Cir.), *cert. denied*, 439 U.S. 965, 99 S.Ct. 453, 58 L.Ed.2d 423 (1978). The purpose of the Act was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152, 93 S.Ct. 1267, 1272, 36 L.Ed.2d 114 (1973) (quoting H.R.Rep. No. 1804, 73d Cong.2d Sess., 1 (1934)). The Act rejected assimilation as a goal and instead sought Indian self-determination. The portion of the Act under attack here, 25 U.S.C. § 465, specifically

addresses the problem of the loss of Indian land and authorizes the Secretary to acquire land in trust "for the purpose of providing land for Indians."

The text of the Act gives the Secretary broad discretion to acquire land in trust, but it also limits that discretion explicitly. It directs that any land acquired must be for Indians as they are defined in 25 U.S.C. § 479. It authorizes the appropriation of a limited amount of funds with which land could be acquired and specifically prohibits use of such funds to acquire land for the Navajo Indians outside of their established reservation boundaries in Arizona and New Mexico.

The court's conclusion that the statutory language does not give the Secretary adequate direction ignores the Act's historical context. Although § 465 uses broad language, its direction that land be acquired "for the purpose of providing land for Indians," has specific meaning in light of the failure of the allotment policy and Congressional rejection of assimilation as a goal. It instructs the Secretary that land should be acquired to replace the millions of acres of Indian land lost as a result of the allotment policy and placed in trust to prevent its alienation. This interpretation is reinforced by related provisions in the Act which specifically prohibit features of the allotment system. Such provisions, for example, prohibit allotment of reservation land to individual Indians, 25 U.S.C. § 461, extend existing periods of trust and restrictions on alienation on any Indian lands, 25 U.S.C. § 462, authorize restoration of surplus lands to tribal ownership, 25 U.S.C. § 463, and prohibit the transfer of restricted Indian lands except to Indian tribes. 25 U.S.C. § 464.

The Secretary's authority is also limited by the guidance provided in the legislative history of the Indian Reorganization Act. *See Mistretta*, 488 U.S. at 376 n. 10, 109 S.Ct. at 657 n. 10. That history explains that § 465 was enacted in response to the loss of 90 million acres that resulted from the operation of the allotment system, H.R.Rep. No. 1804, 73d Cong.2d Sess., 6 (1934), and identifies goals of "rehabilitat[ing] the Indian's economic life" and "develop[ing] the initiative destroyed by . . . oppression and paternalism." *Mescalero*, 411 U.S. at 152, 93 S.Ct. at 1272. Its various provisions were designed to encourage tribal enterprise and enable Indians "to enter the white world on a footing of equal competition." *Id.* at 157, 93 S.Ct. at 1275, citing 78 Cong. Rec. 11732. The legislative history also directs that after land is acquired in trust, the Secretary must assure continued "beneficial use by the Indian occupant and his heirs." H.R.Rep. No. 1804 at 7. *See also City of Tacoma v. Andrus*, 457 F.Supp. 342 (D.D.C.1978).

The availability of judicial review of the Secretary's actions may also serve to limit the delegation here. *See Garfinkel*, 29 F.3d at 459. Judicial review "is a factor weighing in favor of upholding a statute against a nondelegation challenge." *Id.* The majority focuses on the Secretary's claim that such review is not available under the APA in this case, but does not consider the issue, which has not yet been developed in the trial court.

The majority chooses to disregard the limits on the Secretary's authority and the principles that guide the exercise of his discretion. It claims that it cannot consider narrowing constructions because it is bound by the holding in *Chase v. McMasters*, 573

F.2d at 1015-16. *Chase* did not hold that § 465 grants the Secretary unlimited authority to acquire land, however, but merely rejected the suggestion that the authority is limited to acquiring land for landless Indians and concluded that § 465 authorized the Secretary to accept conveyance of title to land already owned in fee by an Indian.

Although the court recognizes that it is bound by the holding in *Chase*, it rejects the interpretation there of the legislative history of § 465 when it claims that Congress meant only to provide agrarian land for landless Indians. It states its own view that Congress only intended "that the Secretary acquire rural lands suitable for farming, grazing, and logging by Indians." Not only is this interpretation of the legislative history contrary to *Chase*, but the majority's approach turns the nondelegation doctrine on its head. Instead of using the legislative history to inform its reading of the statute, the court uses it in an attempt to establish a line beyond which authority could not lawfully be delegated. The relevant question for the nondelegation doctrine, however, is whether the statute contains sufficient standards to meet the constitutional requirement of specificity.

Plaintiffs' allegations raise state and local concerns related to taxation and regulation of land and possible gambling operations. These concerns appear to have influenced the majority, but they are not directly relevant to the constitutional analysis. Whether federal policy should support the taking of land into trust for Indian tribes is up to the other branches of government, not the judiciary.

In its discussion the court does not limit itself to the specific land acquisition at issue in this case, but instead hypothesizes that the Secretary, as head

of an "agency fiefdom," may "purchase the Empire State Building in trust for a tribal chieftain as a wedding present" or "provide a lake home for a politically faithful tribal officer." This is pure speculation. Whether such transactions would be permissible under the statute are not questions raised by this case, and the Secretary's regulations make it unlikely that such scenarios could arise.[2]

---

[2] Contrary to the court's assertion that the Secretary has asserted "unlimited power," the regulations reflect the Congressional concern that the land be acquired for the benefit of Indians. 25 C.F.R. § 151.1-151.15. The Department's land acquisition policy for tribes and for individual Indians is stated in 25 C.F.R. § 151.3:

> (a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status
>
> 1) when the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or,
>
> 2) when the tribe already owns an interest in the land[;] or,
>
> 3) when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.
>
> (b) Subject to the provisions contained in the acts of Congress which authorize land acquisitions or holding land in trust or restricted status, land may be acquired for an individual Indian in trust status
>
> 1) when the land is located within the exterior boundaries of an Indian Reservation, or adjacent thereto; or,
>
> 2) when the land is already in trust or restricted status.

The regulations also list specific factors to be considered when evaluating a request. These include the need for the individual Indian or the tribe for additional land, the purposes

The record indicates that the land at issue here was part of the Tribe's original reservation, but was later lost. The land was purchased by the Tribe after it had been zoned for industrial purposes, and the Tribe stated that it intended to develop an industrial park on it. Any attempt to develop a gambling casino on trust land would be subject to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, which requires both consideration by the Secretary of various factors and approval by the governor of the State. 25 U.S.C. § 2719(b)(1).[3] The hypothetical "opportunities for abuse" the majority fears are not based on the record here and do not provide a sufficient basis to strike down an act of Congress.

For all the reasons stated, the court is wrong in finding § 465 of the Indian Reorganization Act of 1934 an unconstitutional delegation of legislative authority. The district court should not be reversed on

---

for which the land will be used, the impact on the state and its political subdivisions resulting from the removal of the land from the tax rolls, and jurisdictional problems and potential conflicts of land use which may arise. 25 C.F.R. § 151.10 (April 1995).

The Secretary promulgated new regulations on June 23, 1995 which require that state and local governments which are affected by a proposed acquisition be notified and given time to respond. 25 C.F.R. §§ 151.10, 151.11 (60 F.R. 32879, June 23, 1995). Although the old regulations do not set out such a notice requirement, it was apparently done in practice. The State and city in this case both were notified and responded. The 1995 regulations also provide several additional factors to consider for off-reservation land acquisitions.

[3] This statute also provides that nothing in the section limiting gaming on trust land "shall affect or diminish the authority and responsibility of the Secretary to take land into trust." 25 U.S.C. § 2719(c).

this basis. The Act was intended "to rehabilitate the Indian's economic life" and "to develop the initiative destroyed by a century of oppression and paternalism," *Mescalero*, 411 U.S. at 152, 93 S.Ct. at 1272, and the Congressional delegation of authority for that purpose is principled and proper.

III.

The nonconstitutional issues on the appeal need to be addressed, and one of these requires reversal. Plaintiffs claim under the APA that the Department failed to follow its own procedures when it reviewed and approved the Tribe's request to take land into trust,[4] that the Assistant Secretary acted beyond the scope of his delegated authority, and that the decision to take the land into trust was arbitrary, capricious and an abuse of discretion. The district court relied on the analysis in *State of Florida v. United States Department of the Interior*, 768 F.2d 1248 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1986), to conclude that the Quiet Title Act (QTA), 28 U.S.C. § 2409a, precludes review in this case and that it therefore lacked jurisdiction. The QTA permits the United States to be sued to resolve real property disputes, but by its terms it does not apply to trust or restricted Indian lands. 28 U.S.C. § 2409a. For the reasons discussed below, I would reverse and remand for further proceedings.

[4] Plaintiffs assert that the Assistant Secretary for Indian Affairs failed to consider on the record the factors listed in 25 C.F.R. § 151.10. Specifically, they claim that the Assistant Secretary did not know the actual purposes for which the land would be used, did not explain the need of the Tribe for additional land, and did not consider the jurisdictional problems and potential conflicts of land use which might arise, or the effect of the removal of the land from the tax rolls. They also assert that the Assistant Secretary did not consider whether the acquisition was consistent with 25 C.F.R. § 151.3, which describes when land outside the reservation may be acquired, and did not follow procedures described in memoranda issued by the Secretary of the Interior.

The APA waives the sovereign immunity of the United States and federal officers for challenges to an agency action in which the relief sought is not money damages. 5 U.S.C. § 702. The broad waiver of immunity contains an exception, however:

> Nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Id. The QTA, 28 U.S.C. § 2409a, is one such "other statute that grants consent to suit" referred to in the APA waiver provision. *Block v. North Dakota ex rel. Board of University and School Lands*, 461 U.S. 273, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983). The QTA provides that:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights.

28 U.S.C. § 2409a. It also provides that this section permitting suits against the United States "does not apply to trust or restricted Indian lands. . . ." *Id.*

The QTA is the exclusive means by which an adverse claimant can assert a property interest against the United States. *Block*, 461 U.S. at 286, 103 S.Ct. at 1819; *Ducheneaux v. Secretary of the Interior*, 837 F.2d 340, 343 (8th Cir.), *cert. denied*, 486 U.S.

1055, 108 S.Ct. 2822, 100 L.Ed.2d 923 (1988). If such a claim is barred by the provisions of the QTA because it involves title to Indian trust lands or the statute of limitations has run, for example, it cannot be brought under another statute. *Block*, 461 U.S. at 286, 103 S.Ct. at 1819; *Ducheneaux*, 837 F.2d at 343 (application of the QTA "preempts" review under the APA). The waiver of immunity in the APA does not apply to such claims. *Id.*

The key point here is these plaintiffs do not assert a property interest in the land. Instead they seek judicial review of the agency action by which land was acquired. The QTA would not provide consent to suit for such a claim, even if Indian trust lands were not involved. The question then is to what extent the QTA provisions limit the scope of the waiver of immunity in the APA for claims to which the QTA itself does not apply.

It would distort the meaning of the QTA to interpret it as impliedly forbidding all suits seeking to divest the United States of title to Indian trust land, including those in which judicial review of the agency decision to acquire trust lands is invoked. The QTA was enacted to allow adverse claimants to assert their interests in real property by suing the United States. Its provisions set out the requirements for a valid complaint of this type. The exception for Indian lands was included to avoid the possibility that such suits be used to "abridg[e] the historic relationship between the Federal Government and the Indians without the consent of the Indians." H.R.Rep. No. 1559, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 4547, 4556-57. The statutory language simply states that the section does not apply to such lands. To say that Congress intended by this to foreclose any type of claim which could result in divestment of title to Indian trust land would require an excessively broad reading of the statute's language and its purpose.

State of Florida v. United States Department of the Interior, relied on by the district court, held that a suit challenging the United State's title to Indian trust land was impliedly forbidden by the QTA, even though it was not technically a suit to quiet title. 768 F.2d at 1253-55. That conclusion was based on a finding there that the suit challenged the tribe's conduct on the land, rather than the Secretary's decision to acquire the land, and thus did not seek review of an agency action. *Id.* at 1251. The *Florida* plaintiffs did not intervene during the trust application process, but complained only after the tribe began selling cigarettes and operating a bingo facility on the land.

In contrast, plaintiffs here seek review of an agency action. They actively opposed the land being taken into trust throughout the Department's review of the Tribe's application, and their claims specifically challenge the decision to acquire the land and the process by which that decision was made. This case more closely resembles *City of Sault Ste. Marie v. Andrus*, 458 F.Supp. 465, 470-72 (D.D.C.1978), which held that the QTA did not preclude claims challenging the Department's decision to take land into trust.[6]

The nature of the relief sought in a challenge to existing title differs from that sought in a request for review of an administrative decision to acquire title. This is true even though both could result in divest-

[6] Plaintiffs in *Sault St. Marie* claimed that the tribe for which land was taken into trust was not a tribe within the meaning of the Indian Reorganization Act.

ment of title to Indian trust land. The *Florida* decision rests on the fact that the complaints in that case arose only after the land was taken into trust. In such circumstances divestment could interfere with an existing trust relationship. Although the plaintiffs in this case similarly ask that the trust acquisition be set aside,* the complaint seeks review of decisions made before the trust relationship was established. Challenging the acquisition of title is less intrusive to a trust relationship than challenging the status of existing title.

In sum, the QTA does not prevent these plaintiffs from bringing an APA claim to challenge the Secretary's decision to take title to the land in trust for the Tribe, and the district court's dismissal of these claims should be reversed. In its motion for dismissal, the Department also raised the issue regarding the availability of judicial review which was not considered below. That issue should be resolved by the district court on remand.

For these reasons, I would reverse the judgment of dismissal and remand for further proceedings consistent with this opinion.

---

* The timing of the actual taking of the land into trust does not affect the analysis in this case. The final decision to take the land was made on December 13, 1990, but because of problems with the title, the actual acquisition did not occur until November 30, 1992. When this action was filed on July 13, 1992, it technically did not seek to divest the United States of title, but to prevent it from completing the acquisition. If the QTA were interpreted to preclude all claims to divest after acquisition, jurisdiction could have been lost on November 30, or possibly earlier. Because the QTA does not affect claims seeking the type of judicial review sought here, however, the date of the acquisition does not appear to be of critical importance.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

Civ. 92-3023

STATE OF SOUTH DAKOTA and CITY OF OACOMA,
PLAINTIFFS

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR;
EDDIE BROWN, Assistant Secretary-Indian Affairs;
and JERRY JAEGER, Acting Area Director,
Bureau of Indian Affairs,
DEFENDANTS

[Filed April 1, 1994]

MEMORANDUM OPINION

PROCEDURAL HISTORY

Plaintiffs the state of South Dakota and the city of Oacoma (plaintiffs) brought this action seeking judicial review of an administrative decision of the Department of the Interior (DOI), an agency of the United States. Plaintiffs also seek a declaration that the statute under which the DOI acted is unconstitutional. Pending are a motion to dismiss by defendants, a motion for summary judgment by plaintiffs, and several other motions tangential to these dispositive motions.

FACTS

A. March 30, 1990, Application of the Lower Brule Sioux Tribe

On March 30, 1990, the Tribal Chairman for the Lower Brule Sioux Tribe, a federally-recognized Indian tribe, sent a letter to the Bureau of Indian Affairs (BIA) asking that a parcel of land adjacent to and lying partially within the town of Oacoma, South Dakota, be taken into trust for the benefit of the tribe.[1] *See* Exhibit to Attachment 17 of the Administrative Record (A.R. 17). The BIA is a subdivision of the DOI. The land, consisting of approximately 91 acres, lies seven miles south of the southernmost boundaries of the Lower Brule Sioux Reservation and adjacent to and partially within the city of Oacoma. On March 30, 1990, the BIA sent a letter to the Governor of South Dakota and the Mayor of Oacoma requesting comments on the proposed trust acquisition on the subjects of taxes, governmental services provided to the property, and zoning. A.R. 22, Exhibit 8.

B. April 26, 1990, Response of the State of South Dakota

On April 26, 1990, the state of South Dakota responded to the BIA's March 30 inquiry. A.R. 22, Exhibit 15. The state believed the BIA had provided insufficient information about the project to enable

[1] Although the tribe's request was officially made on March 30, 1990, apparently the tribe's intentions were known in advance of the March 30 letter. The administrative record reveals that as early as February 28, 1990, letters in resistance to the proposal were sent to the BIA. *See* A.R. 1-5, 22, Exhibit 6.

the state to respond intelligently. *Id.* Specifically, the state contended that it should be told the purpose for which the tribe intended to use the proposed trust lands. *Id.* Without this information, the state argued that it could not determine whether the proposal was suitable under 25 C.F.R. §§ 151.3(a)(3) and 151.10. *Id.* Furthermore, although the state was able to determine what the current taxes on the undeveloped property were, the state could not determine what the taxes would be once the property was developed because that issue depended on what improvements were made. *Id.* Likewise, the state could not venture an opinion as to how zoning laws would be affected without knowing the purpose for which the land would be used. *Id.*

The state also mentioned that "some" had suggested that the tribe would use the land to build a gambling casino. A.R. 22, Exhibit 15. On this subject, the state informed the BIA that the governor of South Dakota was not prepared to say whether the state would allow gaming pursuant to 25 U.S.C. § 2719(b). *Id.* Rather, the state suggested that the tribe negotiate with the state for a gaming compact *prior to* the DOI's decision whether to take the land into trust. *Id.*

The final major issue raised by the state concerned criminal and civil jurisdictional problems which would arise if the land were taken into trust. A.R. 22, Exhibit 15. The state contended that the nearest tribal law enforcement officer was twenty-five miles away from the proposed trust land and that it would cause unnecessary criminal jurisdiction problems if law enforcement on the proposed parcel were to be handled by tribal police. *Id.* This concern was especially exigent, in the state's opinion, because part of

the land was within the town of Oacoma. *Id.* The state also expressed concern over civil jurisdiction and stated that such things as the routine enforcement of contracts would become unnecessarily difficult. *Id.*

C. April 26, 1990, Response of the City of Oacoma

On April 26, 1990, the City of Oacoma responded to the March 30 letter from the BIA. A.R. 22, Exhibit 16. Oacoma, like the state, contended that it had been provided too little information about the tribe's application to make an intelligent response. *Id.* Oacoma specifically decried the lack of information on the purpose for which the tribe intended to use the land and the reason why the tribe believed trust status was necessary to accomplish this purpose. *Id.*

However, based on the limited information conveyed to Oacoma, Oacoma gave the following responses. The taxes currently collected on the property were $326.88, although this figure would be higher if the land was developed. *Id.* The town of Oacoma currently provided law enforcement and fire protection services to the property. *Id.* The land which was within the city limits was zoned for commercial use. *Id.* In addition, Oacoma, like the state, expressed a great deal of concern over criminal and civil jurisdictional problems which the town believed would arise if the property were to be placed in trust. *Id.* Finally, Oacoma asked for time to submit a supplemental response to the agency after the BIA provided the town with a copy of the tribe's application.[2] *Id.*

[2] Oacoma had made several Freedom of Information Act requests to the BIA and DOI for copies of the tribe's application to take the property into trust, but the agency had not complied. In fact, the BIA told Oacoma that Oacoma would have to request the application from the tribe and that it would be the tribe's decision whether to share a copy of the application with Oacoma. A.R. 22, Exhibit 14.

D. May 15, 1990, Opinion from the Office of the Solicitor

The Office of the Solicitor issued a letter on May 15, 1990, to the BIA Aberdeen Area Director attempting to answer the following questions originally raised by Oacoma. A.R. 13. The letter was forwarded from the Aberdeen Area Director to the BIA Superintendent for the Lower Brule Agency on May 22, 1990.

1. If trust status were granted, would the property be considered "Indian country" for purposes of civil and criminal jurisdiction?

The opinion stated that the answer to this question depended on whether the DOI proclaimed the property to be added to the Lower Brule's existing reservation. *Id.* If so, the property would clearly become "Indian country" for jurisdictional purposes. *Id.*

If the property was merely taken into trust without being added to the reservation, state civil regulations which apply under other circumstances to the United States would also apply to the activities of others on the property. A.R. 13. As to criminal regulations, the opinion stated that state criminal laws would apply if the parcel did *not* qualify as a dependent Indian community. *Id.* If the parcel constituted a dependent Indian community, then tribal and federal criminal laws would apply. *Id.* The

letter enclosed a 1982 opinion from the Office of the Solicitor on what constitutes a "dependent Indian community." *Id.*

2. If the answer to Question 1 is "yes," would Oacoma's ordinances, including zoning ordinances, be enforceable?

The opinion stated that if the property were also added to the reservation, no Oacoma ordinance would apply. A.R. 13. If the property were taken into trust but not added to the reservation, Oacoma's criminal ordinances would apply if the property were *not* a dependent Indian community. *Id.* If the property were taken into trust but not added to the reservation, Oacoma's civil ordinances which do not affect the proprietary interest of the United States *may* apply. *Id.* Oacoma could not collect real property taxes under any scenario and could only collect sales taxes if the property were not added to the reservation. *Id.* Oacoma could regulate the sale of alcoholic beverages only if the land were not added to the reservation and was not a dependent Indian community. *Id.* State law governing gambling would apply if the land were not added to the reservation and were not Indian country, but the federal Indian Gaming Regulatory Act would otherwise apply. *Id.*

3. Assuming that land placed in trust status is Indian country for jurisdictional purposes, can the Lower Brule Sioux Tribe consent to state jurisdiction?

The opinion stated that the tribe *could* consent to state jurisdiction and outlined the procedure for obtaining such consent. A.R. 13.

4. Does the Town of Oacoma have any right to notice and hearing prior to the placement of land in trust?

The opinion answered this question in the negative, stating that 25 U.S.C. § 465 places the decision solely in the Secretary of the Interior's discretion with no requirement of notice and hearing. A.R. 13. However, the opinion also noted that DOI regulations provided a thirty-day comment period for appropriate local governmental units. A.R. 13.

E. May 17, 1990, Memorandum from Lower Brule Agency Superintendent to Aberdeen Area Director

On May 17, 1990, the BIA Superintendent for the Lower Brule Agency sent a memorandum to the BIA Area Director for the Aberdeen area. A.R. 15. The memorandum alleged that the Superintendent had reviewed the tribe's request and "evaluated the responses by the various governmental entities" and "the solicitor's response to Oacoma questions." *Id.* The memorandum discussed factors set forth in 25 C.F.R. § 151.10 and concluded that the federal government should take the land into trust for the benefit of the tribe. *Id.* Although the Superintendent acknowledged in the memorandum that the state and Oacoma had expressed concerns over jurisdictional problems, the memorandum did not discuss what these concerns were and merely concluded that the concerns were "overstated." *Id.* The complete packet concerning the proposed trust acquisition was transferred from the BIA Superintendent to the Aberdeen Area Director on May 25, 1990. A.R. 17.

F. June 1, 1990, Supplemental Response of the City of Oacoma

After having been provided a copy of the Lower Brule Sioux Tribe's request for land to be taken into trust, the city of Oacoma submitted a supplemental response to the DOI regarding that request. A.R. 22, Exhibit 22. The application revealed that the purpose for which the tribe intended to use the land was to pursue economic development through the creation of an industrial park which would include preferential employment opportunities for Native Americans. *Id.* Based on this purpose, Oacoma objected to the federal government's taking of the land into trust for the tribe. *Id.*

Specifically, Oacoma objected that the tribe had not shown that the property's trust status was essential for the proposed tribal development. A.R. 22, Exhibit 22. Oacoma argued that trust status was not essential because the tribe had an alternate site for the project on the tribe's reservation (and thus already in trust), where the program could be carried out equally successfully. *Id.* Oacoma also objected to the tribe's request on the grounds that Oacoma would be unduly burdened if it had to provide additional municipal services to the developed property without being able to assess taxes on the property to defray the costs of these additional services. *Id.*

G. June 29, 1990, Rebuttal from the Tribe

On June 29, 1990, the Lower Brule Sioux Tribe sent a letter to the BIA commenting on the responses which the state and Oacoma had sent to the BIA. A.R. 22, Exhibit 25. The tribe stated that, although it had for fifteen years maintained an industrial park

within the reservation boundaries, the park had not flourished because of "the stigma associated with Reservations, distance from the interstate highway," and lack of a servicing airport. *Id.* The tribe asserted that since it had purchased the land adjacent to Oacoma, several manufacturing firms had indicated interest in operating on the site. *Id.* The tribe was of the opinion that the advantages of the land being in trust (i.e., no property taxes), as well as the site's proximity to Interstate 90 and the presence of a nearby airport were necessary ingredients in attracting the attention of the industries that expressed interest in the proposed park. *Id.* The tribe also asserted that trust status was necessary because the tribe was unsophisticated and would not be able to command fair treatment in the "whiteman's [sic] world" without the federal government's assistance and protection. *Id.*

The tribe also contended that Oacoma did not currently provide any governmental services to the proposed trust property. A.R. 22, Exhibit 25. Specifically, the tribe stated that Oacoma did not provide snow removal, fire protection, solid waste removal, or water and sewage service. *Id.* The tribe stated that any businesses which located at the site would have to pay for these services themselves. *Id.*

On the issue of criminal jurisdiction, the tribe pointed out that Oacoma does not have its own police force but rather contracts for law enforcement services with the Lyman County Sheriff's Office. A.R. 22, Exhibit 25. The tribe stated that the sheriff's office has only one deputy on duty at a time and that the deputy must cover the entire county which is 48 miles by 52 miles. *Id.* Therefore, the tribe argued that response time from tribal police, located only

seven miles from the proposed site, would probably be faster than the response time currently provided by the Lyman County Sheriff's Office. *Id.* The tribe also stated in its letter that a public meeting had been held with the "members of the Oacoma Board of Directors." *Id.*

H. Subsequent Actions

On August 10, 1990, the BIA Acting Area Director forwarded the documentation relative to the proposed trust acquisition to the office of the Assistant Secretary—Indian Affairs of the DOI. A.R. 19. The cover memorandum contained a brief outline of the documents being forwarded, but no real discussion of the elements of 25 C.F.R. § 151.10. *Id.* The BIA Acting Area Director requested approval of the tribe's request for trust status. *Id.*

On December 13, 1990, the Acting Assistant Secretary—Indian Affairs of the DOI issued a memorandum to the BIA Aberdeen Area Director approving the acceptance of the property into trust for the tribe. A.R. 28. The memorandum contained no discussion of the factors found in 25 C.F.R. § 151.10, but merely stated the conclusion that the acquisition was consistent with applicable guidelines and would be in the best interests of the tribe. *Id.*

On November 30, 1992, the land in question was transferred to the United States of America in trust for the Lower Brule Sioux Tribe.

DISCUSSION

A. Subject Matter Jurisdiction

Section 5 of the Indian Reorganization Act, as amended, provides in pertinent part as follows:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> * * *
>
> Title to any lands or rights acquired pursuant to sections . . . 465 . . . of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 465. The immediate question posed by plaintiffs' complaint is whether a decision of the Secretary of the Interior (Secretary) under 25 U.S.C. § 465 is subject to judicial review.

Defendants urge in their motion to dismiss that decisions of the Secretary under section 465 are not subject to judicial review because such decisions are wholly committed to the Secretary's discretion. The Administrative Procedure Act (APA) provides for judicial review of federal agency action where only non-monetary relief is requested so long as the agency decision in question is not "committed to agency discretion by law." *See* 5 U.S.C. §§ 701(a)(2), 702. However, the Court raises *sua sponte* another issue related directly to this Court's subject matter jurisdiction.

It is axiomatic that the United States' sovereign immunity protects it from lawsuits except where the federal government has expressly waived that immunity. Furthermore, waivers of sovereign immunity are strictly construed against the party seeking to sue the sovereign. At least one court has found, based on an analysis of the Quiet Title Act (QTA), 28 U.S.C. § 2409a, that the United States did not intend to waive its sovereign immunity as to actions like the one brought herein by the state of South Dakota and the city of Oacoma. *See Florida Dep't of Business Regulation v. United States Department of the Interior*, 768 F.2d 1248 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011, 106 S. Ct. 1186, 89 L. Ed. 2d 302 (1986).

In *Florida Department of Business Regulation*, the Eleventh Circuit was asked to review a decision of the Secretary pursuant to section 465 in which land outside a reservation was taken into trust for the Seminole Indian Tribe. *Id.* at 1250. The plaintiffs were political subdivisions of the state of Florida who challenged the Secretary's decision, but did not themselves claim any property interest in the land at issue. *Id.* at 1250, 1254.

The Eleventh Circuit noted that the APA waives sovereign immunity for review of administrative action only to the extent that another statute does not expressly or impliedly forbid suit. *Id.* at 1253. The court observed that the QTA provided the exclusive means by which the United States' title to land could be challenged. *Id.* at 1254 (citing *Block v. North Dakota ex rel Bd. of University & School Lands*, 461 U.S. 273, ——, 103 S. Ct. 1811, 1819, 75 L. Ed. 2d 840 (1983)). The court further noted that the QTA

expressly prohibited challenges to the United States' title to Indian trust lands. *Id.* at 1253-54.

The Eleventh Circuit recognized that, in the usual action to quiet title under the QTA, the plaintiffs assert an adverse property interest in the land while in this case, the state of Florida was not asserting any property interest in the trust land. *Id.* at 1254. However, the court stated that Congress's intent in excluding actions involving Indian trust lands from the QTA was to prevent third parties from interfering with the United States' trust relationship with Indians. *Id.* The lawsuit brought by Florida, if allowed to proceed, would disrupt the trust relationship between the United States and Indians to the same extent as if Florida were asserting a property interest in the trust land. *Id.* Therefore, the court concluded that to prevent circumvention of congressional intent behind the QTA, the court must not exercise jurisdiction to review decisions of the Secretary made pursuant to 25 U.S.C. § 465. *Id.*

The holding of *Florida Department of Business Regulation* dictates that this Court not review the Secretary's decision in this case. In this case, as in the Eleventh Circuit case, the plaintiffs are not asserting an adverse property interest in the trust land, but if allowed to proceed, the plaintiffs' suit would disrupt the United States' trust relationship with Indians, specifically with the Lower Brule Sioux Tribe. Were *Florida Department of Business Regulation* clearly the uniform federal law, the Court's discussion would end here. However, there is at least one other federal court which appears to be in conflict with the Eleventh Circuit.

In *Sault Saint Marie v. Andrus*, 458 F. Supp. 465, 467 (D.D.C. 1978), the district court was asked to

review a decision of the Secretary made pursuant to section 465 taking land outside a reservation into trust for an Indian tribe. The defendants argued that the United States was an indispensable party and that under the QTA, 28 U.S.C. § 2409a, the United States had not waived its sovereign immunity from suit. *Id.* at 469.

The district court recognized that the APA waives sovereign immunity to allow review of administrative action only if another statute does not expressly or impliedly forbid the lawsuit. *Id.* at 470. Unlike the Eleventh Circuit, however, the district court in *Andrus* concluded that the QTA did not impliedly forbid actions seeking judicial review of the Secretary's decisions under section 465. *Id.* at 471-72. The district court concluded that the QTA was enacted for very limited reasons and that Congress did not intend for the QTA to have application outside the narrow confines of that act. *Id.* Because the plaintiffs in *Andrus* were not asserting an adverse property interest in the land in question, their lawsuit did not fall within the parameters of the QTA. *Id.* Accordingly, the district court concluded that the QTA did not act to impliedly forbid plaintiffs' suit for judicial review of the Secretary's decision under section 465. *Id.*

Whether the Eighth Circuit would adopt the Eleventh Circuit's or the *Andrus* court's interpretation of the APA and QTA is somewhat unclear. In *Ducheneaux v. Secretary of the Interior*, 837 F.2d 340, 341 (8th Cir.), *cert. denied*, 486 U.S. 1055, 108 S. Ct. 2823, 100 L. Ed. 2d 923 (1988), a non-Indian woman brought a suit seeking judicial review of the Secretary's decision that she was not entitled to half of her late Indian husband's trust lands. The Eighth

Circuit held that the QTA prohibited federal courts from assuming jurisdiction over the suit because it was a lawsuit which challenged the United States' title to land held in trust for an Indian. *Id.* at 342-44. The *Ducheneaux* court quoted at length and approvingly from the Eleventh Circuit's decision in *Florida Department of Business Regulation*. *Id.* at 343. However, *Ducheneaux* is not completely dispositive of the issue now facing this Court because the plaintiff in *Ducheneaux* was asserting an adverse property interest in the land held by the United States. *Id.* at 341. Thus, *Ducheneaux* fell squarely within the provisions of the QTA while the plaintiffs' claims in this case do not.

In *Chase v. McMasters*, 573 F.2d 1011, 1015-16 (8th Cir. 1978), the facts were much more analogous to this case in that defendants therein (the parties challenging the Secretary's decision), were not asserting a property interest in the land that had been taken into trust. Although the *Chase* court did not discuss the issue of the court's jurisdiction under the APA and QTA, the court nevertheless exercised its jurisdiction to decide the issue of whether the Secretary had abused its discretion in taking certain land into trust pursuant to section 465. *Id.*

Neither *Chase* nor *Ducheneaux* directly determine the issue of whether the QTA impliedly forbids suits under the APA when plaintiffs, who do *not* claim a property interest in land, seek review of a decision of the Secretary to take land into trust for Indians pursuant to 25 U.S.C. § 465. The Court finds the Eleventh Circuit's rationale in *Florida Department of Business Regulation* more persuasive than that expressed by the district court in *Andrus*. Furthermore, the *Ducheneaux* court's discussion of *Florida*

Department of Business Regulation convinces this Court that the Eighth Circuit finds that rationale persuasive also. Accordingly, the Court finds that it has no jurisdiction to review the Secretary's decision and plaintiffs' complaint must be dismissed.

B. Constitutional Claims

Review of the Secretary's decision under the APA would have involved an inquiry into whether the Secretary's decision was arbitrary and capricious and whether the Secretary abided by its own regulations. These areas of inquiry are barred by the QTA, as discussed above. However, plaintiffs also challenge the very constitutionality of 25 U.S.C. § 465. This issue presents a federal question over which this Court can and will assert jurisdiction. *See* 28 U.S.C. § 1331.

Plaintiffs challenge the constitutionality of section 465 both facially and as applied to the trust acquisition in this case. Plaintiffs' first argument concerning the facial validity of the statute is that "[a]ny taking of land into trust off the reservation is beyond the power of Congress." Plaintiff's Amended Complaint, Cause of Action ¶ IV. However, Congress's power over Indians and Indian tribes is plenary and certainly entails the power to take land into trust on behalf of Indian tribes, even when that land lies outside the exterior boundaries of a particular tribe's reservation. U.S. Const. art. I, § 8, cl. 3; and *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599-600 (1906) (stating that Congress has plenary power over Indians). *See also New York v. United States*, —— U.S. ——, 112 S. Ct. 2408, 2417, 120 L. Ed. 2d 120 (1992) (stating

that if the Constitution confers on Congress authority over a certain subject, then "the Tenth Amendment expressly disclaims any reservation of that power to the States"); *Ashton v. Cameron County Water Improvement Dist. No. 1*, 298 U.S. 513, 528, 56 S. Ct. 892, 895, 80 L. Ed. 1309 (1936) (stating that, although states have the power to tax and borrow, the federal government may control or interfere with this power if the right to do so is conferred by the Constitution).

Plaintiffs' next argument presents an as-applied challenge to the statute. Plaintiffs assert that the taking of land into trust in this case was not supported by a rational purpose and, therefore, violates the tenth amendment to the United States Constitution. Plaintiffs' Amended Complaint, Cause of Action ¶ IV. Plaintiffs argue that the taking of land into trust in this case was not supported by a rational purpose because the Lower Brule Sioux Tribe had not proposed an actual intended use for the property. *Id.* Without such a proposed use being tendered to the Secretary, the plaintiffs argue that the Secretary's action could not have been supported by a rational purpose. *Id.*

Plaintiffs' argument ignores the state of the administrative record before this Court. On March 30, 1990, the Chairman of the Lower Brule Sioux Tribe sent a letter to the BIA asking that the land in question be taken into trust. A.R. 17, Exhibit. In that letter, the Chairman stated that the tribe intended to use the land to create an industrial park to which the tribe would try to attract businesses. *Id.* The tribe proposed to negotiate with these businesses preferential employment provisions for Native Americans and thereby provide increased economic benefit

for the tribe and surrounding communities. *Id.* This certainly provides the Secretary with a rational basis for its decision so that the taking in question does not violate the tenth amendment.

Plaintiffs make much of the fact that the tribe initially thought the Samsonite company would relocate to the proposed site. When the Samsonite company put its plans to move to the site on hold, plaintiffs seem to suggest that this somehow negated the tribe's intended use for the land. This is simply not the case. Although it is true that the tribe anticipated that the Samsonite company would set up a plant at the proposed site, the tribe's letter to the Secretary asking that the land be taken into trust does not mention the Samsonite plant. A.R. 17, Exhibit. Instead, the letter merely states a general purpose of creating an industrial park, which could be accomplished with any number of businesses aside from Samsonite. *Id.* The tribe's general proposed purpose for the land constitutes a rational purpose justifying the Secretary's decision.

Of course, the gravamen of plaintiffs' claim is the allegation that the tribe intended from the beginning to use the land not for an industrial park, but for gambling, and that the Secretary knew of this hidden purpose. The only support in the administrative record for plaintiffs' theory is the letter from plaintiff state of South Dakota to the BIA in which it asserted that "some" had suggested that the tribe would use the land to build a gambling casino. A.R. 22, Exhibit 15. This does not substantiate the plaintiffs' claims that the tribe's true hidden purpose for the land was to conduct gaming thereon and that the Secretary knew this, but turned a "blind eye" to the tribe's machinations. Furthermore, the Secretary

may take land into trust even when the tribe intends to use the land for gaming, although different regulations govern such acquisitions. Plaintiffs have failed to carry their burden of demonstrating a violation of the tenth amendment.

Plaintiffs also assert a claim that "25 U.S.C. § 465 constitutes an unlawful delegation of legislative power from Congress to the Executive Branch and therefore acquisition of land under this statute *in this case* was unlawful and unconstitutional." Plaintiffs' Amended Complaint, Cause of Action ¶ VI (emphasis added). Although the emphasized language would seem to indicate that this is an as-applied challenge, plaintiffs' claim is better characterized as a facial challenge to the statute. This is because plaintiffs argue that the delegation contained in section 465 is so broad and standardless that it is impossible to ascertain in any given case whether the Secretary has obeyed the will of Congress. *See* Plaintiffs' Amended Complaint ¶ XVI.

Congressional delegation of legislative power to another branch of government is valid "if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372-73, 109 S. Ct. 647, 655, 102 L. Ed. 2d 714 (1989) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105, 67 S. Ct. 133, 142, 91 L. Ed. 2d 103 (1946)). Prior to 1935, the United States Supreme Court never found a congressional delegation to be unconstitutional. *Id.* at 373, 109 S. Ct. at 655. Then, in 1935, the Court invalidated two statutes as excessive delegations. *Id.* (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935);

and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 466 (1935)). Following *Schechter* and *Panama Refining*, the Court again has failed to find any congressional delegation, some of which have been very broad, to be excessive. *Id.* As discussed below, it is clear that section 465 is also constitutional under the nondelegation doctrine.

From the mid- to late 1800s until 1934, Congress pursued an allottment policy with regard to Indians. This policy sought the assimilation of Indians into mainstream society and the eventual destruction of Indian society. Congress attempted to accomplish this mission by allotting Indian reservation land to individual Indians and then allowing those Indians to sell their allottments after a brief trust period. So-called surplus reservation lands were often sold outright to non-Indians without any intervening allottment trust period. The allotment policy was a failure.

In 1934, congressional policy toward Indians changed abruptly with the passage of the Indian Reorganization Act of 1934 (IRA), of which 25 U.S.C. § 465 is a part. *See* 25 U.S.C. §§ 461-479. The IRA discontinued the further allottments of Indian lands, extended indefinitely the period of trust on allotted land for which the trust period had yet to expire, and authorized the Secretary of the Interior to acquire further land to be held in trust for Indian tribes or individual Indians. *See* 25 U.S.C. §§ 462-63, 465. The purpose of the IRA was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." H.R. Rep. No. 1804, 73d Cong., 2d Sess., 1 (1934).

In section 465, Congress has clearly identified the public agency to which power is being delegated: the Secretary of the Interior. Furthermore, the context in which section 465 was passed clearly delineates the general policy to be applied and the bounds of that delegated authority. *See Mistretta*, 488 U.S. at 372-73, 109 S. Ct. at 655. That is, the Secretary is to acquire land for Indians to help reverse the effects of the Indians' loss of land under the allotment policy and to help Indians become more self-sufficient, both economically and otherwise. Therefore, the Court finds that section 465 does not represent an unconstitutional delegation of legislative power to the executive branch of government.

CONCLUSION

The Administrative Procedure Act (APA) waives the sovereign immunity of the United States to allow judicial review of administrative action where the relief requested is non-monetary. 5 U.S.C. § 702. However, this waiver of sovereign immunity is limited. The APA does not waive the sovereign immunity of the United States where another statute expressly or impliedly forbids the relief sought. *Id.* The Court finds that the Quiet Title Act (QTA), 28 U.S.C. § 2409a, specifically the QTA's prohibition on bringing suit to challenge the United States' title to Indian trust lands, impliedly forbids plaintiffs' suit under the APA. The Court also finds that 25 U.S.C. § 465 is constitutional both on its face and as applied in this case. Accordingly, it is hereby

ORDERED that defendants' motion to dismiss (Docket No. 31) is granted.

IT IS FURTHER ORDERED that plaintiffs' motion for summary judgment (Docket No. 36) is denied.

IT IS FURTHER ORDERED that defendants' motion to strike (Docket No. 52) and plaintiffs' motion regarding defendants' response to statement of facts (Docket No. 56) are both denied as moot.

Dated this 1st day of April, 1994.

By the Court:

/s/ Richard H. Battey
RICHARD H. BATTEY
United States District Judge

Attest:

WILLIAM F. CLAYTON
Clerk

By: /s/ Alice R. Raesly
Deputy Clerk
(SEAL)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

Civ. 92-3023

STATE OF SOUTH DAKOTA and CITY OF OACOMA,
PLAINTIFFS

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR;
EDDIE BROWN, Assistant Secretary-Indian Affairs;
and JERRY JAEGER, Acting Area Director,
Bureau of Indian Affairs,
DEFENDANTS

[Filed April 1, 1994]

JUDGMENT

In accordance with the memorandum opinion filed herein, it is hereby

ORDERED that defendant shall have judgment against the plaintiff.

IT IS FURTHER ORDERED that costs in the amount of $———— shall hereinafter be taxed and inserted by the Clerk.

Dated this 1st day of April, 1994.

By the Court:

/s/ Richard H. Battey
RICHARD H. BATTEY
United States District Judge

Attest:

WILLIAM F. CLAYTON
Clerk

By: /s/ Alice R. Raesly
Deputy Clerk
(SEAL)

APPENDIX C

[DOI Logo]

UNITED STATES DEPARTMENT
OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS
Interior Board of Indian Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

IBIA 91-82-A

STATE OF SOUTH DAKOTA and
TOWN OF OACOMA

v.

ABERDEEN AREA DIRECTOR,
BUREAU OF INDIAN AFFAIRS

APPEAL FROM A DECISION TO TAKE LAND
INTO TRUST STATUS FOR THE
LOWER BRULE SIOUX TRIBE

Decided June 12, 1992

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellants State of South Dakota and Town of Oacoma seek review of a March 22, 1991, letter from the Aberdeen Area Director, Bureau of Indian Affairs (BIA; Area Director), to the Lower Brule Sioux Tribe (Tribe). This letter informed the Tribe that certain properties located within the Town of Oacoma and Lyman County, South Dakota, would be accepted into trust status upon satisfactory elimination of several title problems set forth in a preliminary title opinion. For the reasons discussed below, the Board of Indian Appeals (Board) dismisses this appeal for lack of jurisdiction.

Background

The land at issue in this appeal is located next to Interstate Route I-90 in South Dakota. It is approximately 7 miles from the Tribe's reservation. The Tribe has statd that it intends to use the property for economic development purposes. Although the Tribe had attempted to develop a site on its reservation for this purpose, it indicated that it had been unable to attract businesses to the reservation despite the incentives it was offering, primarily because of the distance from I-90 and the lack of an airport.

By letter dated March 30, 1990, to the Superintendent, Lower Brule Agency, BIA, the Tribe requested that the land be taken into trust status for its benefit. The request was reviewed by the Superintendent, information was requested from various State agencies and subdivisions concerning the impact removal of the land would have on the State,

comments were received from State and local officials, legal opinions on the effect of a trust acquisition were requested and provided, and a recommendation was made by the Superintendent to the Area Director that the trust acquisition be approved.

In reviewing the request, the Area Director asked for and received a preliminary title opinion from the Department's Field Solicitor's Office. By letter dated September 17, 1990, a preliminary title opinion was provided. The opinion listed seven possible problems with title. It also stated that the Area Director would need "Central Office approval to place [the] property into trust status" (Letter at 2).

The Area Director forwarded the trust acquisition request and its supporting information to the Assistant Secretary—Indian Affairs. By memorandum dated December 13, 1990, the Acting Assistant Secretary responded:

> We have received your memorandum of August 10 with the attached documentation requesting our review and approval of a fee to trust transfer of approximately 91.96 acres located in Lyman County, South Dakota * * *.
>
> * * * * *
>
> The request is made pursuant to procedures promulgated under 25 CFR 151.3(a)(3) and 54 BIAM Bulletin No. 2, signed on April 20, 1990, which require review by the Secretary of all off-reservation fee-to-trust acquisitions, with the exception of those for housing for Oklahoma tribes and individuals.
>
> We have determined the proposed acquisition is consistent with applicable guidelines and

would be in the best interest of the [Tribe]. Therefore, you are authorized to accept the subject conveyance to the United States in trust for the [Tribe], subject to the receipt of satisfactory title evidence in accordance with 25 CFR 151.12.

By letter dated March 22, 1991, the Area Director informed the Tribe:

> Pursuant to 25 CFR this is to advise you of the proposed acceptance of certain properties into Trust status for the [Tribe]. * * *
>
> * * * * *
>
> Upon satisfactory elimination of the objections listed in the Preliminary Title Opinion, dated September 17, 1990, I intend to accept the property in Trust.

The Board received appellants' notice of appeal from this letter on April 22, 1991. Briefs were filed by appellants, the Area Director, and the Tribe.

Jurisdiction

[1] Although not raised by any party in the briefs in this matter, the Board finds that it must dismiss this appeal because it lacks jurisdiction. The Board has previously considered the precise situation raised in this appeal. In *City of Escanaba, Michigan* v. *Acting Minneapolis Area Director*, 19 IBIA 247 (1991), the Board stated:

> It is clear that, although the Acting Area Director notified appellant of the decision, the decision itself was made by the Assistant Secretary—Indian Affairs. The Board does not have

> jurisdiction to review decisions made by the Assistant Secretary, which are final for the Department of the Interior unless the Assistant Secretary provides otherwise in his decision. 25 CFR 2.6(c); *see, e.g., Spokane Tribe of Indians* v. *Acting Assistant Secretary—Indian Affairs*, 18 IBIA 379 (1990).
>
> Even if the Acting Area Director's January 23, 1991, letter is construed as a decision made by the Area Director, the Board would lack jurisdiction over this appeal under 43 CFR 4.331, which provides:
>
> > Any interested party affected by a final administrative action or decision of an official of the Bureau of Indian Affairs issued under regulations in Title 25 of the Code of Federal Regulations may appeal to the Board of Indian Appeals, except—
> >
> > * * * * *
> >
> > (b) Where the decision has been approved in writing by the Secretary or Assistant Secretary—Indian Affairs prior to promulgation.
>
> 19 IBIA at 247-48.

For the same reasons, the Board lacks jurisdiction to review this decision.[1]

---

[1] The Board would, however, like to refer BIA to 25 CFR 2.7(a) which provides that "[t]he official making a decision shall give all interested parties known to the decisionmaker written notice of the decision * * *." If parties were fully informed when the Assistant Secretary has been involved in the decisionmaking process, needless and useless administrative appeals, with their resulting delay, could be avoided.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal from the March 22, 1991, letter of the Aberdeen Area Director is dismissed for lack of jurisdiction.

/s/ Kathryn A. Lynn
KATHRYN A. LYNN
Chief Administrative Judge

I concur:

/s/ Anita Vogt
ANITA VOGT
Administrative Judge

APPENDIX D

[DOI Logo]

UNITED STATES DEPARTMENT
OF THE INTERIOR

OFFICE OF THE SECRETARY
Washington, D.C. 20240
Aberdeen Area Office
Branch of Realty

Dec. 13, 1990

Memorandum

To: Aberdeen Area Director
Acting

From: Assistant Secretary—Indian Affairs

Subject: Recommendation to Transfer to Trust Status Certain Off-Reservation Fee Land on behalf of the Lower Brule Sioux Tribe of Indians in South Dakota

We have received your memorandum of August 10 with the attached documentation requesting our review and approval of a fee to trust transfer of approximately 91.69 acres located in Lyman County, South Dakota, described as:

> A portion of the Northeast Quarter of the Northwest Quarter (NE-¼NW-¼) lying North (N) of Highway No. 16 (shown as Lot H-1 in Book 3 of Plats, page 108) and except Lot "A" of Lester's Addition (a subdivision of the NE-¼ NW-¼) of Section Twenty-four (24) and West Half of the Southwest Quarter (W-½SW-¼) of Section Thirteen (13), and the Northwest Quarter of the Northwest Quarter of the Northwest

Quarter (NW-¼NW-¼NW-¼) of Section Twenty-four (24), and the Northeast Quarter of the Northwest Quarter of the Northwest Quarter (NE-¼NW-¼NW-¼) of Section Twenty-four (24), and Northwest Quarter of the Southwest Quarter (NW-¼SW-¼) of Section Thirteen (13), Township One Hundred Four North (104N), Range Seventy-two (72), West of the Fifth Prime Meridian (W. 5th P.M.), Lyman County, South Dakota.

(As recited on Warranty Deed to UNITED STATES OF AMERICA IN TRUST FOR THE LOWER BRULE SIOUX TRIBE executed May 13, 1990.)

The request is made pursuant to procedures promulgated under 25 CFR 151.3(a)(3) and 54 BIAM Bulletin No. 2, signed on April 20, 1990, which requires review by the Secretary of all off-reservation fee-to-trust land acquisitions, with the exception of those for housing for Oklahoma tribes and individuals.

We have determined the proposed acquisition is consistent with applicable guidelines and would be in the best interest of the Lower Brule Sioux Tribe of Indians in South Dakota. Therefore, you are authorized to accept the subject conveyance to the United States in trust for the Lower Brule Sioux Tribe, subject to the receipt of satisfactory title evidence in accordance wih 25 CFR 151.12.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 94-2344SDRC

STATE OF SOUTH DAKOTA, ET AL., APPELLANTS

v.

UNITED STATES DEPARTMENT OF INTERIOR, ET AL., APPELLEES

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

The suggestion for rehearing en banc is denied. Chief Judge Arnold, Judge McMillian, Judge Beam, and Judge Murphy would grant the suggestion for rehearing en banc.

The petition for rehearing by the panel is also denied.

February 2, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk
U.S. Court of Appeals
Eighth Circuit

APPENDIX F

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 151

[1076-AD65]

Land Acquisitions

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final Rule.

SUMMARY: This rule establishes a 30-day waiting period after final administrative decisions to acquire land into trust under the Indian Reorganization Act and other federal statutes. The Department is establishing this waiting period so that parties seeking review of final decisions by the Interior Board of Indian Appeals or of decisions of the Assistant Secretary-Indian Affairs, will have notice of administrative decisions to take land into trust before title is actually transferred. This notice allows interested parties to seek judicial or other review under the Administrative Procedure Act and applicable regulations.

EFFECTIVE DATE: April 24, 1996.

FOR FURTHER INFORMATION CONTACT: Mary Jane Sheppard, Staff Attorney, Office of the Solicitor, Division of Indian Affairs, Room 6456, Main Interior Building, 1849 C Street, NW, Washington, DC 20240; Telephone (202) 208-6260.

SUPPLEMENTARY INFORMATION: On July 15, 1991, the proposed rule for off-reservation land

acquisitions for Indian tribes was published in the Federal Register (56 FR 32278-32280). On June 23, 1995, the final rule was published at 60 FR 32878. That rulemaking supplemented the existing regulations in part 151. This procedural rule adds a subsection to existing 25 CFR 151.12, Action on requests.

Background

In response to a recent court decision, *State of South Dakota* v. *U.S. Department of the Interior*, 69 F.3d 878 (8th Cir. 1995), the Department of the Interior is establishing a procedure to ensure the opportunity for judicial review of administrative decisions to acquire title to lands in trust for Indian tribes and individual Indians under section 5 of the Indian Reorganization Act (IRA) (Pub. L. 73-383, 48 Stat. 984-988, 25 U.S.C. 465). Following consideration of the factors in the current regulations and completion of the title examination, the Department, through Federal Register notice, or other notice to affected members of the public, will announce any final administrative determination to take land in trust. The Secretary will not acquire title to the land in trust until at least 30 days after publication of the announcement. This procedure permits judicial review before transfer of title to the United States. The Quiet Title Act (QTA), 28 U.S.C. 2409a, precludes judicial review after the United States acquires title. See, *e.g.*, *United States* v. *Mottaz*, 476 U.S. 834 (1986); *North Dakota* v. *Block*, 461 U.S 273 (1983); *Florida* v. *Department of Interior*, 768 F.2d 1248 (11th Cir. 1985).

Section 5 of the IRA authorizes the Secretary to acquire land in trust for Indians and Indian tribes:

(1) Within or adjacent to an Indian reservation; or (2) for purposes of facilitating tribal self-determination, economic development, or Indian housing. *State of South Dakota*, a case involving an off-reservation trust land acquisition, held Section 5 of the IRA unconstitutional on the ground that it violates the nondelegation doctrine. The court's decision was based in substantial part on the understanding that judicial review is not available to challenge the Secretary's action. The court noted that "judicial review is a factor weighing in favor of upholding a statute against a nondelegation challenge." The rule ensures that such review is available before formal conveyance of title to land to the United States, when the QTA's bar to judicial review becomes operative. Judicial review is available under the APA because the IRA does not preclude judicial review and the agency action is not committed to agency discretion by law within the meaning of the APA.

While the Eighth Circuit decision precludes the Secretary from taking into trust the land at issue in that particular case, new trust acquisitions will be made on a case-by-case basis. The procedure announced in today's rule, however, will apply to all pending and future trust acquisitions.

The Department certifies that this procedural rule meets the standards provided in Sections 2(a) and 2(b)(2) of Executive Order 12778.

The Department has determined that this rule:

—Does not have significant federalism effects.

—Will not have significant economic impact on a substantial number of small entities under

the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

—Does not have significant takings implications under E.O. 12630.

—Does not have significant effects on the economy, nor will it result in increases in costs or prices for consumers, individual industries, Federal, State, or local governments, agencies, or geographical regions.

—Does not have any adverse effects on competition, employment, investment, productivity, innovation, or the export/import market.

—Is categorically excluded from the National Environmental Policy Act of 1969 because it is of an administrative, technical, and procedural nature. Therefore, neither an environmental assessment nor an environmental impact statement is warranted.

This rule is not a significant rule under E.O. 12866 and does not require approval by the Office of Management and Budget.

This rule is not a major rule as defined in 5 U.S.C. 804. The annual number of tribal requests to place lands in trust is small. There will be costs incurred by a party seeking judicial review. The author of this rule is: Mary Jane Sheppard, Office of the Solicitor, U.S. Department of the Interior.

Because this is a procedural rule under Section 553(b)(3)(A) of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, it is exempt from requirements for notice and comment rulemaking.

List of Subjects in 25 CFR Part 151

Indians—lands.

For reasons set out in the preamble, Part 151 of Title 25, Chapter I of the Code of Federal Regulations is amended as set forth below.

PART 151—LAND ACQUISITIONS (NONGAMING)

1. The authority for part 151 continues to read as follows:

Authority: R.S. 161: 5 U.S.C. 301. Interpret or apply 46 Stat. 1106, as amended; 46 Stat. 1471, as amended; 48 Stat. 985, as amended; 49 Stat. 1967, as amended, 53 Stat. 1129; 63 Stat. 605; 69 Stat. 392, as amended; 70 Stat. 290, as amended; 70 Stat. 626; 75 Stat. 505; 77 Stat. 349; 78 Stat. 389; 78 Stat. 747; 82 Stat. 174, as amended, 82 Stat. 884; 84 Stat. 120; 84 Stat. 1874; 86 Stat. 216; 86 Stat. 530; 86 Stat. 744; 88 Stat. 78; 88 Stat. 81; 88 Stat. 1716; 88 Stat. 2203; 88 Stat. 2207; 25 U.S.C. 2, 9, 409a, 450h, 451, 464, 465, 487, 488, 489, 501, 502, 573, 574, 576, 608, 608a, 610, 610a, 622, 624, 640d-10, 1466, 1495, and other authorizing acts.

2. Section 151.12, Action on requests, is amended by designating the existing text as paragraph (a) and by adding a new paragraph (b) to read as follows:

§ 151.12 Title examination.

* * * * *

(b) Following completion of the Title Examination provided in § 151.13 of this part and the exhaustion of any administrative remedies, the Secretary shall

publish in the Federal Register, or in a newspaper of general circulation serving the affected area a notice of his/her decision to take land into trust under this part. The notice will state that a final agency determination to take land in trust has been made and that the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published.

Dated: April 17, 1996.

Ada E. Deer,

Assistant Secretary, Indian Affairs.

[FR Doc. 96-9922 Filed 4-29-96; 8:45 am]

BILLING CODE 4310-02-M

☆ U. S. GOVERNMENT PRINTING OFFICE: 1996 408017 40129